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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 760

AARON MINTZ AND LOUIS MINTZ, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF MINTZ & MINTZ, APPELLANTS,

vs.

CHARLES H. BALDWIN, INDIVIDUALLY AND AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

FILED MARCH 7, 1933

(37,457)

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

In Equity

AARON MINTZ and LOUIS MINTZ, Copartners, Doing Business under the Firm Name and Style of Mintz & Mintz Plaintiffs,

against

CHARLES H. BALDWIN, Individually and as Commissioner of Agriculture and Markets of the State of New York, Defendant

NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION—Filed Nov. 10, 1932

To the above-named defendant, Charles H. Baldwin, individually and as Commissioner of Agriculture and Markets of the State of New York; to His Excellency Franklin D. Roosevelt, as Governor of the State of New York; to Hon. John J. Bennett, Jr., as Attorney-General of the State of New York:

SIRS: Take notice that upon the bill of complaint in the above entitled action and the affidavit of Louis Mintz, each duly verified November 4, 1932, copies whereof are herewith served upon you, and pursuant to an order of Honorable [fol. 4] Frank Cooper, United States District Judge, bearing date and duly entered this day in the office of the Clerk of the District Court of the United States for the Northern District of New York, a copy whereof is herewith served upon you, the above-named plaintiffs will apply to the District Court of the United States for the Northern District of New York before three Judges, sitting as prescribed by § 380 of Title 28 of the United States Code, at the Court

Room of the District Court of the United States for the Northern District of New York, at the United States Post-Office Building, in the City of Albany, on the 19th day of November, 1932, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an interlocutory injunction enjoining and restraining the above-named defendant, his successors in office, deputies, assistants, agents and attorneys, and all persons acting by, through or under them, or any of them, or by the direction or authority of them, or of any of them;

1. From enforcing the order, bearing date August 29, 1932, and promulgated by the above-named defendant, a copy of which said order (hereinafter designated as said order), marked "A," is annexed to the bill of complaint herein, and from attempting or purporting to exercice any power, jurisdiction or authority under or by virtue of said order, and particularly from excluding from transportation into the State of New York from the State of Wisconsin any bovine animal over six months of age so imported into the State of New York for dairy or breeding purposes, where the sole reason for such exclusion shall be that such animals are not accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin that such animals have come directly from a herd free from Bang's disease, otherwise called bovine infectious abortion;

2. From instituting or maintaining, or causing to be instituted or maintained, against plaintiffs any prosecutions or actions to collect penalties from plaintiffs for disregard or violation of the provisions of said order;

[fol. 5] 3. From subjecting to inspection, examination and quarantine, after their interstate transportation into the State of New York shall have been completed, healthy bovine animals for the sole reason that said animals are not accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin that such animals have come directly from a herd free from said Bang's disease.

And plaintiffs will then and there apply for such other and further relief, decree, order and rule in the premises

as may be proper and agreeable to equity and good conscience.

Dated November 10, 1932.

Yours, etc., Whalen, McNamee, Creble & Nichols, Solicitors for Plaintiffs. Office and Post-Office address: 75 State Street, Albany, N. Y.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Nov. 10, 1932

The above-named plaintiffs, for their bill of complaint in the above-entitled action, respectfully allege and show to the Court:

1. This is a suit of a civil nature in equity, between citizens of different states, which arises under the Constitution and laws of the United States and the matter in controversy exceeds the sum of Three thousand dollars ($3,000.), exclusive of interest and costs.

2. Plaintiffs at all of the times hereinafter mentioned were, and now are, citizens and residents of Appleton, in the State of Wisconsin, and co-partners in trade, doing business under the firm name and style of Mintz & Mintz, in the States of Wisconsin, New Jersey, and other states.

3. Plaintiffs, as such co-partners, at all of the times hereinafter mentioned, have been and now are engaged in the breeding and in the sale and transportation in interstate commerce of cattle for dairy and breeding purposes. Plaintiffs' herds of cattle are purchased or bred and are located in the State of Wisconsin, from which State of [fol. 7] Wisconsin plaintiffs ship annually to buyers in the State of New York upwards of a thousand head of cattle. Plaintiffs, at great expense, have built up and developed a valuable trade and good will in the State of New York among buyers of plaintiffs' cattle for dairy and breeding purposes, which valuable trade and good will exceeds in value the sum of Three thousand dollars ($3,000.) and which will be completely destroyed by the enforcement of the order hereinafter set forth.

4. At all of the times hereinafter mentioned, the above-named defendant, Charles H. Baldwin, was, and now is, Commissioner of Agriculture and Markets of the State of New York, having his principal office as such Commissioner in the State Office Building, in the City and County of Albany, in the Northern District of New York.

5. As such Commissioner of Agriculture and Markets the above-named defendant is chief executive officer of the department of Agriculture and Markets, established by §270 of the State Department's Law of the State of New York, being Chapter 78 of the Consolidated Laws of the State of New York.

6. By § 24 of the Agriculture and Markets Law of the State of New York, constituting Chapter 69 of the Consolidated Laws of said State, defendant, as such Commissioner, is charged with the duty of providing generally for the exercise of the powers and performance of the duties of said Department of Agriculture and Markets, as prescribed in said Agriculture and Markets Law and the other laws of the State of New York, and providing generally for the enforcement of the provisions of such laws and of the rules enacted as provided in said Agriculture and Markets Law, and to such ends he is authorized to enact, amend and repeal necessary rules which shall provide for the exercise of the powers and performance of the duties of said department.

7. On or about the 29th day of August, 1932, the above-named defendant, purporting to act as such Commissioner, [fol. 8] promulgated, published and posted an order (hereinafter designated as said order), a copy whereof marked "A" is hereto annexed and made a part hereof.

8. Sections 72 and 74 of the said Agriculture and Markets Law, mentioned in said order, provide as follows:

"§ 72. Control and Suppression of Disease.—The commissioner may cause investigations to be made as to the best method for the control, suppression or eradication of infectious or communicable disease affecting domestic animals. Whenever any infectious or communicable disease affecting domestic animals shall exist or shall have recently existed outside this state, the commissioner shall take measures to prevent such disease from being brought into the

state. Whenever any such disease shall exist or be brought into or break out in this state, the commissioner shall take measures promptly to suppress the same and to prevent such disease from spreading. He may issue and publish a notice stating that a specified infectious or communicable disease exists, may exist or has recently existed in the state, or in any designated county or other geographical district thereof, and warning all persons to seclude, in the premises where they may be at the time, all animals within this state, or within such county or district, or an adjoining county or district, that are of a kind susceptible to contract such disease; and ordering all persons to take such precautions against the spreading of the disease as the nature thereof may, in his judgment, render necessary or expedient and which he may specify in such notice. Such notice shall be published in such manner as the commissioner may designate. The commissioner may cause such notice to be posted on public service poles other than those carrying wires transmitting electricity for light or power, or on fences on the highway or on buildings abutting upon the highways, provided, if such fences or buildings be personally owned, the owners thereof consent to such posting. No person shall tear down, mutilate, deface or destroy any such notice or order issued by the commissioner and posted as provided herein, during the pendency of such notice or [fol. 9] order. The commissioner may alter or modify, from time to time, as he may deem expedient, the terms of any notice or order issued or made pursuant to this article and may at any time cancel or withdraw the same. The commissioner may, in behalf of the State, accept, in whole or in part, rules and regulations adopted by the secretary of agriculture of the United States under any act of congress providing for the control, suppression or eradication of communicable diseases in domestic animals, and he may co-operate with the authorities of the United States government within this state in the carrying out of such rules and regulations and the enforcement of the provisions of any such act so passed which are not in conflict with the statutes of this State."

"§ 74. Regulations Relating to Importation.—The following regulations shall apply to the importation of domestic animals:

1. No person shall knowingly bring into this state any domestic animal which has an infectious or communicable disease, except in the case of pure bred registered bovine animals which have been removed from this state and have reacted to the tuberculin or other recognized test subsequent to such removal, may be returned to this state upon written permission from the commissioner subject to such rules as he may prescribe in relation thereto.

2. Any person bringing into this state domestic animals for any purpose other than immediate slaughter without taking precaution to ascertain whether such animals have an infectious or communicable disease shall be presumed to have brought them in knowingly in violation of this section, if they are found to have such disease.

3. Animals received from outside the state under the supervision of the United States department of agriculture or the department of agriculture and markets of the state of New York, or for which a permit or certificate shall have been issued by either of such departments, shall be deemed to have been handled with due precaution.

[fol. 10] 4. Any person importing or bringing into this state neat cattle for dairy or breeding purposes shall report immediately upon bringing such cattle into the state to the department, in writing, stating the number of cattle thus brought in, the places where they were procured, the lines over which they were brought, their destination within the state and when they will arrive thereat; and if there be filed with the department at the time of filing such report or within ten days thereafter, a certificate by a duly authorized veterinary practitioner approved by the authorities of the state in which he resides or by an authorized veterinary inspector of the United States bureau of animal industry to the effect that he has duly examined such animals and that they are free from any infectious or communicable disease, the commissioner may issue a permit to such person to remove such cattle immediately. Otherwise such person shall detain such animals at the point of destination for at least twenty days for inspection or examination by the commissioner or his duly authorized agent. The provisions of this subdivision relating to advance reports to the department shall not apply to cattle

imported into this state at a point where there is federal inspection.

5. Persons bringing into this state or receiving domestic animals from without the state shall give such other information to the department as it may from time to time request relating to such animals.

6. The commissioner may order all or any animals coming into the state to be detained at any place or places for inspection and examination, and if any of them after due examination be found affected with any infectious or communicable disease, such animals shall be condemned and slaughtered or held in strict quarantine.

7. Each animal brought into the state in violation of any of the provisions of this article shall constitute a separate and distinct violation.

8. Nothing contained in this section shall be construed to prevent or make unlawful the transportation of domestic [fol. 11] animals through this state on railroads or boats."

9. Sections 40 and 41 of said Agriculture and Markets Law, provide as follows:

"§ 40. Penalty for Violation of Rule or Order.—Every person, association or corporation and all agents, officers and employees thereof, shall obey every order made as provided in this chapter, as long as such order shall be in force. A person, association or corporation who shall fail by himself, itself or through his or its agents, officers and employees, to obey any order of the commissioner, or who shall violate any rule of the department shall be subject to a penalty not exceeding the sum of two hundred dollars for each and every offense. Every violation of such order, or of the rules of the department, shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense."

"§ 41. Violation of Chapter or Rule a Misdemeanor.—Except as otherwise provided by the Penal Law, a person who by himself or another violates any of the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, or of any law-

ful rule of the department is guilty of a misdemeanor, and upon conviction shall, except as otherwise provided in this chapter, be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment for not less than one month, nor more than six months, or by both such fine and imprisonment, for the first offense; and by not more than one year's imprisonment for the second offense."

10. By an Act, entitled "An Act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of live stock, and for other purposes," passed February 2nd, 1903 (21 United States Code, Sections 120, 121 and 122, as [fol. 12] amended by the Act of Congress passed February 7, 1929), Congress has authorized and directed the Secretary of Agriculture to establish such rules and regulations concerning the transportation of live stock from any place within the United States where he may have reason to believe dangerous, contagious, infectious or communicable diseases among such live stock may exist, into and through any state or territory as he may deem necessary, and has provided that whenever any inspector of the Bureau of Animal Industry shall issue a certificate showing such officer had inspected any cattle or live stock, which were about to be driven or transported from any such locality into another, as above set forth, and had found them free from infectious, contagious, or communicable disease, the animals so inspected and certified may be shipped, driven or transported from any such place into and through any state or territory without further inspection.

11. By an Act, entitled "An Act to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes," passed March 3rd, 1905 (21 United States Code, Sections 123, 124, 125 and 126, as amended by the Act of Congress passed February 7, 1929), Congress has authorized and directed the Secretary of Agriculture to quarantine any state or territory, or portion thereof, when he shall determine the fact that cattle or other live stock in such state or territory are affected with any contagious, infectious, or communicable disease, and when the public safety will permit

make rules and regulations permitting and governing the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment from any quarantined state or territory into another state or territory.

12. Congress, by enacting the two acts hereinbefore last set forth, has assumed control of the entire field of transportation and quarantine of live stock which is the subject of commerce between the States, insofar as action to prevent or lessen the spread of dangerous, contagious, infec- [fol. 13] tious or communicable diseases is concerned, and such control by Congress excludes from that field any action by the several states with respect thereto, by reason whereof said order is null and void in that it contravenes the provisions of the commerce clause, namely, paragraph 3 of section 8 of Article I, of the Constitution of the United States.

13. Said order, in that it is directed against the importation into the State of New York from other States, of healthy cattle, unless such healthy cattle be certified as prescribed in said order to come directly from herds free from Bang's disease, constitutes an unreasonable and arbitrary regulation, employing means which go far beyond the necessities of the case, and therefore deprives these plaintiffs of their property without due process of law, in contravention of the provisions of § 1 of the Fourteenth Amendment to the Constitution of the United States.

14. On or about the 21st day of October, 1932, plaintiffs shipped from Appleton, in the State of Wisconsin, to one Edgar Bartlett, at Sharon Station, in the State of New York, twenty head of grade cattle for dairy or breeding purposes, all over six months of age, which twenty head of cattle, at the time of their arrival at Sharon Station, aforesaid, were accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin, showing the name and address of the laboratory or person making the last blood test on said twenty head of cattle, with a complete statement that the results of such test showed each of said animals to be free from Bang's disease. Said certificate described each of said twenty head of cattle in such manner as to enable its identification by ear tag and

a duplicate of such certificate was filed by plaintiffs with the Department of Agriculture and Markets of the State of New York, at the office thereof in the City of Albany, on or about the 23rd day of October, 1932.

15. Because said certificate neither included nor was accompanied by any certificate that the herd from which [fol. 14] said twenty head of cattle came was free from Bang's disease, the above-named defendant, upon the arrival of said twenty head of cattle at Sharon Station, aforesaid, and before delivery thereof to said Edgar Bartlett, on the 26th day of October, 1932, issued an order, a copy whereof marked "B" is hereto annexed and made a part hereof. By reason of the issuance by defendant of the order last aforesaid, plaintiffs were unable to complete delivery of any of said twenty head of cattle to said Edgar Bartlett, and plaintiffs were compelled to and did, at great pecuniary loss, reship all of said twenty head of cattle from Sharon Station, aforesaid, and transport them to a point outside of the State of New York.

16. For the following reasons among others plaintiffs have no adequate remedy at law in the premises and, therefore, bring this their suit in equity:

(A) In the event that defendant shall continue to enforce said order, as plaintiffs are informed and believe that defendant has threatened and proposes to do, plaintiffs' said business of selling and transporting dairy and breeding cattle from the State of Wisconsin to the State of New York will be completely destroyed, with consequent irreparable loss and damage to plaintiffs, to whom the value of their right to conduct their said business, without such interference by defendant therewith, greatly exceeds Three thousand dollars ($3,000);

(B) Said order has already injuriously affected plaintiffs' said business, in as much as it has prevented the sale and transportation of plaintiffs' cattle from the State of Wisconsin into the State of New York, has resulted in a loss to plaintiffs of orders for cattle from plaintiffs' customers in the State of New York, and has compelled plaintiffs to cancel their acceptance of such orders, in consequence whereof plaintiffs have suffered, and unless the relief herein sought be granted will continue to suffer,

irreparable injury, the pecuniary damages from which are not subject to accurate or correct computation, and the [fol. 15] value to plaintiffs of their right to conduct their said business, without such interference by defendant therewith, greatly exceeds Three thousand dollars ($3,000);

(C) In the event that defendant, as plaintiffs are informed and believe that defendant has threatened and proposes to do, shall subject to inspection, examination and quarantine, after their interstate transportation into the State of New York shall have been completed, healthy bovine animals for the sole reason that such animals are not accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin that such animals have come directly from a herd free from Bang's disease, plaintiffs' said business of selling and transporting dairy and breeding cattle from the State of Wisconsin to the State of New York will be completely destroyed, with consequent irreparable loss and damage to plaintiffs, to whom the value of their right to conduct their said business, without such interference by defendant, therewith, greatly exceeds Three thousand dollars ($3,000);

(D) Should plaintiffs, in disregard of said order, continue to sell and transport their cattle for dairy and breeding purposes from the State of Wisconsin into the State of New York, plaintiffs will be subject to a multiplicity of prosecutions and suits for the collection of the penalties prescribed in sections 40 and 41 of the Agriculture and Markets Law of the State of New York, hereinbefore fully set forth in paragraph 9 hereof.

17. Plaintiffs are ready, and hereby offer, to give the security in such case made and provided, pursuant to section 382 of Title 28 of the United States Code.

Wherefore plaintiffs pray:

(a) For judgment that the above-named defendant, his successors in office, deputies, assistants, agents and attorneys, and all persons acting by, through or under them, or any of them, or by the direction or authority of them, or of [fol. 16] any of them, be enjoined and restrained, both during the pendency of this suit and perpetually:

1. From enforcing said order and from attempting or purporting to exercise any power, jurisdiction or authority under or by virtue of said order, and from instituting or maintaining, or causing to be instituted or maintained, against plaintiffs any prosecutions or actions to collect penalties from plaintiffs for disregard or violation of the provisions of said order;

2. From subjecting to inspection, examination and quarantine, after their interstate transportation into the State of New York shall have been completed, healthy bovine animals for the sole reason that such animals are not accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin that such animals have come directly from a herd free from Bang's disease;

(b) That process issue out of and under the seal of this Honorable Court, directed to defendant, requiring him to appear and answer this bill of complaint on a date to be named by the Court;

(c) That a temporary restraining order be granted by the Court forthwith, restraining defendant, his deputies, assistants, agents and attorneys as above prayed, until a hearing can be had herein;

(d) That a copy of this bill of complaint and of said process, and of any order which may be granted by this Honorable Court with respect thereto, be served upon His Excellency, Franklin D. Roosevelt, Governor of the State of New York, and upon Hon. John J. Bennett, Jr., Attorney General of said State;

(e) That the matters set forth in this bill of complaint be heard and determined by this Court upon a date to be fixed by this Court, and that this Court provide for a hearing thereof by three Judges, after due notice, as prescribed [fol. 17] by §266 of the Judicial Code of the United States, being §380 of Title 28 of the United States Code.

Whalen, McNamee, Creble & Nichols, Solicitors for Plaintiffs. Office and Post-Office address: 75 State Street, Albany, N. Y.

Duly sworn to by Louis Mintz. Jurat omitted in printing.

[fol. 18] EXHIBIT "A" TO BILL OF COMPLAINT

Order Relating to Import Cattle

State of New York, Department of Agriculture and Markets

Charles H. Baldwin, Commissioner

In the Matter of the Control of Bang's Disease (Bovine Infectious Abortion)

It appearing that Bang's disease, an infectious and communicable disease affecting domestic animals, exists outside of the state of New York in areas from which cattle are or may be imported into this state,

Now, therefore, to provent the bringing into this state of such disease, and in pursuance of the authority conferred upon me by Sections 72 and 74 of the Agriculture and Markets Law, I do hereby order that all bovine animals coming into the State of New York shall comply with the following requirements:

All cattle over six months of age imported for dairy or breeding purposes shall come directly from herds certified to be free from Bang's disease by the chief livestock sanitary official by whatever name known of the country, province or state of origin. Such animals at the time of import must be accompanied by a certificate authenticated by such livestock sanitary official showing the name and address of the laboratory or person making the last blood test on such herd with a complete statement of the results of such test on the animals so imported. Such certificate shall describe each animal in such manner as to enable its identification by ear tag number, name and registration number in the case of pure breds and ear tag number in the case of grades. Such certificate shall include or be accompanied by the certificate above mentioned as to freedom of the herd from Bang's disease. A duplicate of such authenticated certificate or certificates must be filed with the Department of Ag-
[fol. 19] riculture and Markets, Albany, N. Y., by the consignee at the time the shipment is received, unless such duplicate has previously been filed by the consignor.

This order shall not apply to the following classes of bovine animals:

(a) Cattle for immediate slaughter, consigned to the public stock yards.

(b) Steers and beef type cattle for feeding and grazing purposes.

This order shall take effect October 1, 1932.
Dated Albany, N. Y., August 29, 1932.
Charles H. Baldwin, Commissioner of Agriculture and Markets.

[fol. 20] EXHIBIT "B" TO BILL OF COMPLAINT

State of New York, Department of Agriculture and Markets

Charles H. Baldwin, Commissioner

Quarantine Order

(Bang's Disease (Bovine Infectious Abortion)

Albany, N. Y., October 25, 1932.

Address: Sharon Station, N. Y.

To W. J. Mulchay, as Agent for N. Y. Central R. R. at Sharon Station, N. Y., by John Collins (extra), agent:

It having been made to appear to the satisfaction of the undersigned Commissioner that the following described bovine animals owned by you and/or under your custody, now located upon premises situated in the township of North East County of Dutchess, State of New York, recently have come into the state from Appleton, Wis., and have been exposed to Bang's disease (bovine infectious abortion); Cows located at Sharon Station, N. Y., in C. M. & St. P. No. 103848 car.

	Ear tag No.	Kind (calf, cow, bull, ox)	Breed	Registration No.	Age	Name and color, marks, etc.
1	27620	Cow	H	.....	4	.....
2	19203	"	"	.....	6	.....
3	61913	"	"	.....	6	.....
4	12333	"	"	.....	5	.....
5	74326	"	"	.....	5	.....
6	35479	"	"	.....	5	.....
7	35246	"	A	.....	5	.....
8	37771	"	H	.....	4	.....
9	93766	"	"	.....	5	.....
10	74352	"	"	.....	6	.....
11	30846	"	"	.....	6	.....
12	13968	"	"	.....	6	.....
13	59299	"	"	.....	4	.....
14	92307	"	"	.....	7	.....
15	76587	"	"	.....	7	.....
16	13969	"	G	.....	8	.....
17	85011	"	H	.....	6	.....
18	60246	"	G	.....	6	.....
19	64038	"	BS	.....	3	.....
20	95554	"	H	.....	3	.....

[fol. 21] (1) Now, Therefore, you are hereby ordered to segregate the above-described animals and keep them separate and apart from all other animals at the place where they now are until inspection and due examination has been had and until further order of the Commissioner.

(2) You are hereby forbidden to remove any of the above-described animals from the premises where they now are, except for immediate slaughter. Immediate slaughter means slaughter within three days after removal from premises where segregated. At least ten days' advance notice of intent to slaughter must be given to the Commissioner, together with the following information:

(a) The date removal is to take place.

(b) The location of the premises where the animals are to be slaughtered.

(c) The time when they are to be slaughtered.

(3) You are further forbidden to sell or use for any purpose the milk from the above-described animals until such milk has been uniformly heated to a temperature of 150 degrees Fahrenheit and held at that temperature for at least twenty minutes.

Charles H. Baldwin, Commissioner, by Charles Linch, Assistant Director.

F. E. R.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LOUIS MINTZ—Filed Nov. 10, 1932

STATE OF NEW JERSEY,
County of Essex, ss:

Louis Mintz, being duly sworn, deposes and says: I am one of the plaintiffs in the above-entitled action and have read the bill of complaint therein duly verified by me this day.

That I am a member of the co-partnership of Mintz & Mintz, plaintiffs in the above-entitled action; that said partnership is engaged in the business of buying, transporting and selling in interstate commerce cattle for dairy and breeding purposes; that said co-partnership has built up and developed a valuable trade and good will in the State of New York among buyers of cattle for dairy and breeding purposes; that said plaintiffs ship annually into the State of New York upward of one hundred carloads of cattle for dairy and breeding purposes; that the success of said business consists in supplying said customers with cattle for dairy and breeding purposes in such numbers and [fol. 23] at such times as their necessities may require; that the said plaintiffs are continuously receiving orders and have now received orders for six carloads of cattle to be shipped from the State of Wisconsin to the State of New York for dairy and breeding purposes; that because of the order issued by the defendant, Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, on August 29, 1932, that became effective October 1st, 1932, as set forth in said bill of complaint, said plaintiffs are unable to fill and are prevented from filling orders which they have received from customers in the State of New York for several carloads of cattle and they are unable to deliver any of said cattle for dairy and breeding purposes to their customers in the State of New York, and that because of said order plaintiffs have suffered an immediate and irreparable injury, loss and damage, and immediate and irreparable injury, loss and damage will continue to result to the plaintiffs before notice can be

served and a hearing had on plaintiffs' application for an interlocutory injunction herein.

Louis Mintz.

Subscribed and sworn to before me this 4th day of November, 1932. Mollie Selsman, Notary Public in and for the State of New Jersey. (Seal.)

[fol. 24] In United States District Court

Aaron Mintz and Louis Mintz, Copartners, Doing Business under the Firm Name and Style of Mintz & Mintz, Plaintiffs,

against

Charles H. Baldwin, Individually and as Commissioner of Agriculture and Markets of the State of New York, Defendant

Temporary Restraining Order—Filed Nov. 10, 1932

Whereas, In the above-entitled cause it has been made to appear by the bill of complaint and by the affidavit of Louis Mintz, each duly verified November 4th, 1932, that an order, bearing date August 29, 1932, and promulgated by the abovenamed defendant (hereinafter designated as said order), contravenes the provisions of the commerce clause, namely paragraph 3 of §8 of Article I of the Constitution of the United States and also the due process clause of § 1 of the Fourteenth Amendment to the Constitution of the United States; that plaintiffs are entitled prima facie to an interlocutory injunction, preliminary to the final hearing in this action, enjoining and restraining the above named defendant as hereinafter directed; and it satisfactorily appearing to the undersigned from said bill of complaint and affidavit that there is danger of immediate and irreparable injury, loss and damage resulting to plaintiffs before notice of an application for this order can be served and a hearing had thereon, particularly because the enforcement by defendant of said order will completely [fol. 25] destroy plaintiffs' business of selling and trans-

porting dairy and breeding cattle from the State of Wisconsin to the State of New York, will result in a loss to plaintiffs of orders for cattle from plaintiffs' customers in the State of New York, will compel plaintiffs to cancel their acceptance of such orders, will subject plaintiffs to a multiplicity of prosecutions and suits for the collection of penalties prescribed in sections 40 and 41 of the Agriculture and Markets Law of the State of New York in case plaintiffs should disregard said order, and because, also, defendant's threatened and proposed subjection to inspection, examination and quarantine, after their interstate transportation into the State of New York shall have been completed, of healthy bovine animals, as hereinafter enjoined, will completely destroy plaintiffs' said business of selling and transporting dairy and breeding cattle from the State of Wisconsin to the State of New York; and plaintiffs having duly given an undertaking, as prescribed by § 382 of Title 28 of the United States Code, which undertaking bears date November 7, 1932, and has been approved by the undersigned this day,

Now, therefore, on motion of Whalen, McNamee, Creble & Nichols, as solicitors for plaintiffs, it is ordered:

(A) That the above-named defendant, his successors in office, deputies, assistants, agents and attorneys, and all persons acting by, through or under them, or any of them, or by the direction or authority of them, or of any of them, be, and they hereby are, and each of them is, enjoined and restrained:

1. From enforcing said order and from attempting or purporting to exercise any power, jurisdiction or authority under or by virtue of said order, and particularly from excluding from transportation into the State of New York from the State of Wisconsin any bovine animal over six months of age so imported into the State of New York for dairy or breeding purposes, where the sole reason for such exclusion shall be that such animals are not accompanied by a certificate authenticated by the chief live stock sanitary [fol. 26] official of the State of Wisconsin that such animals have come directly from a herd free from Bang's disease, otherwise called bovine infectious abortion;

2. From instituting or maintaining, or causing to be instituted or maintained, against plaintiffs any prosecutions or

actions to collect penalties from plaintiffs for disregard or violation of the provisions of said order;

3. From subjecting to inspection, examination and quarantine, after their interstate transportation into the State of New York shall have been completed, healthy bovine animals for the sole reason that said animals are not accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin that such animals have come directly from a herd free from said Bang's disease.

(B) That the above-named defendant appear in this court before three judges, of whom the undersigned shall be one, sitting as prescribed by §380 of Title 28 of the United States Code, at the Court Room of the District Court of the United States for the Northern District of New York, at the United States Post Office Building, in the City of Albany, on the 19th day of November, 1932, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, then and there to show cause, if any defendant have, why the interlocutory injunction for which plaintiffs pray in their said bill of complaint should not be granted;

(C) That one copy each of said bill of complaint, affidavit, this order and notice of plaintiffs' application for such interlocutory injunction be served at least five days before the hearing of such application upon the above-named defendant, upon his Excellency, Franklin D. Roosevelt, as Governor of the State of New York, and upon Hon. John J. Bennett, Jr., as Attorney General of the State of New York;

(D) That the injunctive provisions of this order shall expire at the end of ten days from entry thereof, unless within said period of ten days this order be extended for a [fol. 27] like period for good cause shown, the reasons for such extension to be entered of record;

(E) That said bill of complaint and affidavit be filed, and that said undertaking and this order be filed and entered of record forthwith in the office of the Clerk of this court.

Dated at Albany, New York, November 10, 1932, at 10 o'clock A. M.

Frank Cooper, United States District Judge.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed March 6, 1933

Now comes the defendant and for an answer to the plaintiff's bill of complaint pleads as follows:

1. Defendant denies each and every allegation of paragraphs "10", "11", "12" and "13" of the bill of complaint, except the allegations as to enactment and amendment of the Acts of Congress therein referred to, and the effect and interpretation of those statutes are respectfully submitted to the Court.

2. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of said bill of complaint so far as it states that plaintiffs' business will be completely destroyed by enforcement of the order in said bill of complaint set forth, or of the allegations contained in subdivisions "A", "B" and "C" of paragraph "16" of the bill of complaint, but for the purposes of this litigation defendant does not deny that the plaintiffs will suffer irreparable damage if the order therein set forth is continued to be enforced, nor does the defendant deny that the amount involved herein is more than three thousand dollars.

Wherefore defendant respectfully prays that the relief asked in the bill of complaint be denied, and that he be excused from further attendance upon the Court, and that [fol. 29] the plaintiffs be directed to pay him his costs herein incurred.

Henry S. Manley, Counsel to the Department of Agriculture and Markets; John J. Bennett, Jr., Attorney General of the State of New York, Solicitors for the Defendant.

Duly sworn to by Charles H. Baldwin. Jurat omitted in printing.

[fol. 30] Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 31] Clerk's certificate to annexed paper omitted in printing.

[fol. 32] In United States District Court

[Title omitted]

Affidavit of Charles H. Baldwin—Filed Nov. 19, 1932

State of New York,
Albany County:

Charles H. Baldwin, being duly sworn, deposes and says: I am the defendant herein. I am advised that the bill of complaint challenges as to its constitutionality in two respects a certain order heretofore promulgated by me. That is the "Order Relating to Import Cattle", also entitled, "In the Matter of the Control of Bang's disease (Bovine Infectious Abortion)", by me promulgated on August 29, 1932, effective on October first thereafter. That order is said by the bill of complaint to be open to two constitutional objections: (a) That by two federal statutes enacted in 1903 and 1905, conferring certain powers upon the Secretary of Agriculture, Congress has assumed control of the entire field of transportation and quarantine of live stock, including the matters to which my said order is directed, and so that my order is null and void by reason of conflict with the Commerce Clause of the federal Constitution. (b) That my said order is unreasonable and arbitrary, employing means which go beyond the necessities of the case, and so is void by reason of conflict with the Due Process provisions of the Fourteenth Amendment of the federal Constitution.

[fol. 33] By this affidavit, and by three other affidavits presented herewith in support of it, I respectfully submit to the Court certain facts which I believe to be relevant to a consideration of those two propositions of constitutional law.

Economic Importance of Bang's Disease

The states of Wisconsin and New York are the two greatest producers of dairy products in the United States, and in each state any matter having a material relation to such production is of great concern to its citizens.

Bang's disease frequently causes an infected cow to abort, and thus the breeding efficiency of an infected herd

is less than that of a disease free herd. Whether or not the infected animal aborts, its milk production usually is reduced. Bang's disease is one of the greatest limiting factors in the dairy herds of the United States, both as to reproduction and milk yield.

The disease is generally prevalent throughout all the dairy cattle of the nation, and to a lesser extent affects range cattle. It has been estimated by live stock officials of Pennsylvania and Wisconsin that Bang's disease causes an annual loss of five million dollars and three million dollars in those states respectively. The loss to New York State farmers probably is about the same. The total annual loss for the United States has been estimated by officials of the federal Department of Agriculture at about fifty million dollars.

Public Health Aspect

Bang's disease also has a relation to public health. It is an established fact that the disease known as Undulant Fever is caused by the presence of the Bang's disease germ in the human body, and that such infection can come about by drinking raw milk from an infected cow. There is some difference of expert opinion as to how great a percentage [fol. 34] of persons are susceptible to such infection, and hence as to the relative importance of this factor in public health.

Infectious Nature of Bang's Disease

Animals having the disease give off great numbers of germs in the discharges at and for several days after calving time. These discharges soil the bedding, hay and pasture, or contaminate the water supply. These germs may live for several weeks. They usually enter the susceptible animal through the digestive tract, but there are various other possible avenues of infection. About sixty days after infection the disease may usually be diagnosed although the period of incubation varies greatly and may be considerably more or less.

Method of Diagnosis

There are two blood tests, complement fixation and agglutination, which have value for detecting infected animals. The agglutination method is most commonly used, and consists in observing the action of blood serum from

the suspected animal when added to a liquid referred to as antigen. If the serum forms clumps in a wide dilution of antigen it indicates that the animal is infected. Various dilutions are used in the test, and a blood sample placed in each. Clumping of the sample when placed in fifty times as much antigen, what is known as a 1:50 dilution, usually is regarded as suspicious, and clumping in a 1:100 or wider dilution usually is regarded as definite indication of infection. This interpretation is dependent on herd history.

Assuming that the blood test is skillfully and honestly administered, the information which it gives about the animal is subject to at least one important limitation which prevents full reliance upon a determination through such [fol. 35] diagnosis that the animal is healthy. That is, the disease may be in the animal in the incubative stage.

Besides this well understood limitation, it is a matter of well confirmed expert observation that the same reaction commonly has a different meaning when applied to an animal from a disease-free herd than it has when applied to an animal from a diseased herd.

Method of Control

Because Bang's disease is exceedingly infectious, it is of first importance that diseased animals, including carriers which are apparently healthy, be not added to a herd containing susceptible animals. Unless the two classes of animals are kept separated the disease will be spread.

Various other considerations and factors affecting the control of Bang's disease appear from the three affidavits submitted herewith, and although they are not specifically mentioned here it is conceded that some of them are important. Dr. W. E. Cotton and Dr. J. W. Buck of the Federal Department of Agriculture are hopeful that the problem of Bang's disease control may eventually be solved through a vaccine, but up to the present time there has been no general concession that the usefulness of any vaccine for immunization from Bang's disease outweighs its dangers.

Because it is of first importance that Bang's disease infected animals be not added to herds containing susceptible animals, and because of the obvious diversity of interest between individual sellers and buyers of cattle, and like-

wise of states in which one or the other class predominates, it is a matter of great concern to a state receiving considerable importations of cattle in interstate commerce to pro-
[fol. 36] vide safeguards against the admission, or at least against the admission unrecognized, of Bang's disease infected cattle.

Federal Government Inactive

The federal government, although many times petitioned by various groups in various states, never has imposed by its own sole authority any quarantine or rules or regulation relative to the control of cattle infected with Bang's disease, or relative to their movement in interstate commerce.

Regulation by States

During each year for the last ten years various states have enacted and promulgated, by statute or by order of an authorized official, restrictions tending to exclude or regulate the admission of cattle presenting the danger of Bang's disease infection. As of November 1, 1932, the following forty states imposed such restrictions:

Alabama,	Missouri,
Arizona,	Montana,
Arkansas,	New Hampshire,
Connecticut,	New Jersey,
Delaware,	New York,
Florida,	North Carolina,
Georgia,	North Dakota,
Idaho,	Ohio,
Illinois,	Oklahoma,
Indiana,	Oregon,
Iowa,	Pennsylvania,
Kansas,	Rhode Island,
Kentucky,	South Carolina,
Louisiana,	South Dakota,
Maine,	Texas,

[fol. 37]

Maryland,	Utah,
Massachusetts,	Virginia,
Michigan,	West Virginia,
Minnesota,	Wisconsin,
Mississippi,	Wyoming.

In eight of those states (Kentucky, Maine, Massachusetts, New Hampshire, Oregon, Rhode Island, South Dakota, Wyoming) the prohibition is merely against bringing in any animal known to be diseased, or which was found positive on a test, and apparently in those states no certificate of freedom from disease is required for admission of cattle generally. In each of the thirty-two other states listed some form of certificate of freedom from Bang's disease is required in order to import cattle for breeding and dairy purposes. A few states expressly authorize importation of diseased animals by special permit, and there are some exceptions as to pure bred animals, cattle for exhibition purposes, etc.

Federal Government Aware of State Regulation

Obviously that general practice of requiring proof of freedom from Bang's disease as a condition for interstate transportation of cattle has not grown up during the past ten years without responsible federal officials being well aware of it. As appears from the affidavit of Dr. Wills, federal officials sat on committees which recited the fact that Bang's disease was a matter to which it did not thus far appear that any general regulation was adapted, and those committees by their reports listed the states which already had such regulations and urged that others enact them. As confirmation of the obvious fact that the federal Department of Agriculture was well aware of those state regulations, and gave them its approval, the Court is referred to Miscellaneous Circular 14 issued by that Depart-[fol. 38] ment in February, 1924, revised in 1928 and 1930 and most recently in June, 1932. Its title is, "State Sanitary Requirements Governing Admission of Livestock," and it lists such requirements imposed by each state, including the requirements concerning freedom from Bang's disease.

An Authoritative Statement of Federal Policy as to Bang's Disease

The data referred to above seems open to but one interpretation as to the federal policy, but to avoid uncertainty I have obtained a recent expression from Honorable Arthur

M. Hyde, Secretary of Agriculture. The following is his letter in full text:

"Nov. 15, 1932.

Hon. Charles H. Baldwin, Commissioner, Department of Agriculture and Markets, Albany, N. Y.

DEAR MR. BALDWIN: Referring to the visit of Dr. J. C. Wills, a representative of your office, with regard to the regulation and control of Bang's disease, also known as contagious abortion, you are advised that this Department has issued no quarantines or regulations pertaining to this disease. The Department is aware, however, that over twenty of the States have issued such regulations governing the importation of cattle into their States so as to prevent the introduction of this disease. The Department is disposed, for the present, to leave the control of Bang's disease with the various States.

"You may also be interested to know that there is now before the Congress a joint resolution, H. J. No. 12, which would allow the States to act with regard to any animal quarantine measure until such time as the Federal Government may issue regulations on the same subject matter. This Department is in sympathy with the provisions of that resolution.

Sincerely yours, Arthur M. Hyde, Secretary."

[fol. 39] New York Herd Owners Petitioned Washington

New York State, notwithstanding its importance as a dairy state, and notwithstanding that its officials and scientists realized the seriousness of Bang's disease, as is evidenced by various pamphlets published by the Department of Agriculture and Markets and Cornell University prior to the present year, nevertheless was one of the last states to adopt a restriction upon the importation of infected cattle.

On September 8, 1931, at a meeting of the Executive Committee of the New York Holstein-Friesian Association, Inc., a resolution was adopted that the Secretary of the Association write to the federal Secretary of Agriculture and ask for federal action to prevent the interstate shipment of cattle infected with Bang's disease. Such a letter was written, which recited:

"Over forty thousand dairy cows were imported to New York State last year. Most of these cows were of the Holstein breed. Reports from tests made on several of these shipments indicate that in some cases the reactors are running as high as seventy-five per cent to the abortion test."

Attempt to Enact State Statute

Having learned that the policy of the federal government was to continue to leave this matter to state action, the herd owners of New York State turned their attenion to their own Legislature. On February 1, 1932, Assemblyman A. A. Hartshorn, a farmer of Madison County much interested in the breeding of Holstein-Friesian cattle and twice president of the Holstein-Friesian Association of America, introduced in the Assembly a bill providing that a certificate of having passed an agglutination test be required for all cattle brought into the state for dairy and breeding purposes. The bill provided also for official recognition of Bang's disease free herds.

That bill passed both houses of the Legislature, and on March 21, 1932, was vetoed by Governor Roosevelt. The [fol. 40] memorandum filed by the Governor in explanation of his veto said:

"The Commissioner of Agriculture and Markets tells me that the proposed amendment to Section 74 of the Agriculture and Markets Law is unnecessary and that the proposed amendment to Section 80 is wholly undesirable. He states that the Legislature has delegated to his Department ample authority, through regulation and order, to deal with the questions of preventing the importation of diseased cattle into the State. Furthermore, he has on February 20, 1932, already made an order dealing with exactly the same subject that this bill treats. The bill is unnecessary and is therefore disapproved."

The Order of February, 1932

The Commissioner of Agriculture and Markets referred to by the Governor was my predecessor in office, Honorable Berne A. Pyrke. On February 20, 1932, he promulgated an order effective March 31, 1932, which provided that all cattle imported into the State be detained at destination for

thirty days or more secluded from all other animals and be tested for Bang's disease, excepting such animals as were accompanied by a certificate that they were from a Bang's disease free herd or had individually passed a test for Bang's disease. That order, without any important change, remained in effect until October 1, 1932.

Failure of That Order

The failure to accomplish its purpose of an order requiring only a certificate from the state of origin that the individual animals certified have passed a single negative test is a matter well proven by experience, buttressed by expert opinion. I have already mentioned the fact that a blood test to identify cattle infected with Bang's disease, assuming that the test is honestly and skillfully administered, is subject to at least one important limitation, that the infection may be in the incubative stage. Besides that [fol. 41] limitation there is the fact that a suspicious reaction to the test (such as clumping of the blood in the 1:50 dilution) has more serious implications if the animal is from an infected herd or herd of unknown history than if it is from a herd which has passed successive clean tests.

The certificate as to the single test of the individual animal cannot be relied upon fully as a guide for admitting or excluding the animal. In the affidavits submitted herewith is representative evidence that expert opinion and practical experience agree upon this point.

For instance, Dr. Hardenburgh found that of fifteen carloads of cows imported into New Jersey in 1928 and 1929 all certified by the states of origin to be free from Bang's disease, upon retesting after receipt 10% of the animals (49 out of 485) were in fact diseased. He thereupon changed his method of purchase. In fairness it should be mentioned that his change of method was not prompted by a desire to buy only from disease free herds, but by a suspicion that the method of testing and certification peculiar to Wisconsin was fallible. However his experience shows that some serious factor of error was involved in buying on certificates issued by the states of origin as to the single test of individual animals, and his subsequent experiences showed the much better results to be obtained by buying only animals from disease free herds.

In the summer of 1932 I was informed from many sources that the cattle coming into New York State and certified by the states of origin to have passed negative tests as to Bang's disease, in fact contained a large percentage of in- [fol. 42] fected cattle. After taking both expert and practical advice I became convinced that the order then in effect was an inadequate safeguard to the herd owners of the state and was doing actual harm by giving them a false sense of security.

In order to ascertain and record the fact beyond doubt, at about the time I promulgated the order now involved I directed that retests be made upon a representative number of cattle then coming into the state.

The result of those retests is shown by the affidavit of Dr. Linch. Of 1521 cattle which came into this state about September 1, 1932, from eleven different states and Canada, all certified by the states of origin to have been tested and found free from Bang's disease, only 1201 or 79% were found free upon retest, and 166 or 10.9% were definitely classed as diseased.

In the light of the experience and the expert opinion to which I have referred I know that the order which was in effect before October 1, 1932, was inadequate.

Purpose of the Present Order

The present order has no purpose other than to safeguard the herd owners and milk consumers of New York State. I believe it is reasonably adapted to that purpose. At the same time the order was promulgated a plan was initiated to clean up gradually and by voluntary cooperation of herd owners the infected herds within the state. The order is intended to keep out accessions of infection, so that the work of cleaning up, segregating and gradually disposing of reactors, can go on unimpeded. If the herd owners of this state can be assured that incoming cattle are free from infection self-interest will prompt that such cattle be added only to disease free herds, and the continuance of the order will tend to encourage the rapid increase of Bang's disease free herds both within and without New York State. [fol. 43] Some of the same expert opinion which favors the present order suggests that it logically should provide also for the admission of known reactors as accessions to im-

mune and infected herds. I believe there is no great demand for such importations into this state, and that supervising the allocation within this state of such animals if admitted would present an administrative problem which is a decisive practical objection to such a provision.

Plaintiffs are Guilty of Laches

Between the time when the present order was promulgated, on August 29, 1932, and the time when it became effective, on October 1, 1932, it was given wide publicity, not only within New York State but in all the principal states which ship cattle to this state. It was given such publicity in Wisconsin, and I am informed and believe that these plaintiffs knew about this regulation and its effective date several weeks before it became effective, but that they have slept upon their rights without excuse.

C. H. Baldwin.

Sworn to before me this 18th day of November, 1932.
Mary E. McAuliffe, Notary Public.

[fol. 43½] [File endorsement omitted.]

[fol. 44] Clerk's certificate to annexed paper omitted in printing.

[fol. 45] In United States District Court

[Title omitted]

Affidavit of Charles Linch—Filed Nov. 19, 1932

State of New York,
Albany County:

Charles Linch, being duly sworn, deposes and says:

I reside at Delmar, N. Y. I was graduated from the State Veterinary College at Ithaca, N. Y., in 1905, and ever since then have worked as a veterinarian. Since 1910 I have been in the employ of the Department of Agriculture and Markets of the State of New York (under the various names borne by that department). Since July 1, 1924, I

have been, and I now am, Assistant Director of the Bureau of Animal Industry in that Department. I am a member of the American Veterinary Medical Association, the United States Live Stock Sanitary Association, and other organizations for the exchange of professional and official information. I am familiar in a general way with such knowledge as has been acquired about Bang's disease, and to make such knowledge available to non-professional persons I have written Bulletin 243 published by the Department, entitled "Contagious Abortion."

From March 31, 1932, to September 30, 1932, inclusive, there was effective in New York State a regulation or order promulgated by authority of the Commissioner of Agriculture and Markets under which cattle could be admitted to the State for dairy and breeding purposes only if ac- [fol. 46] companied by a certificate from the state of origin to the effect that each animal had been given a blood test and found to be free from Bang's disease. It is well known among persons familiar with the actual workings of this method of excluding diseased cattle that it is far from completely effective.

Various criticisms of this regulation were advanced during the first few months it was in effect. On August 16, 1932, the Commissioner stated to me that he had received a number of complaints regarding the methods used in securing and testing blood samples from cattle shipped into this state from certain other states. He directed me to have blood samples drawn and retested upon several carloads of cattle coming into this state, and if possible upon several carloads from each state shipping any considerable number to this state.

This work was started on August 17, 1932, and the last orders to test were issued on October 1, 1932. In general an order was issued as to each carload as soon as the test chart covering it was received by the Department, which in some cases was before arrival of the cattle in this state, and in other cases immediately afterwards. There was no selection of cars, except such as was necessarily involved in an endeavor to distribute the retesting among arrivals from all the states shipping extensively to this state.

Each order was directed to an official veterinarian, and directed him to draw a sample of blood from each animal and forward it to the State Veterinary College at Ithaca

for examination. Samples taken in the western part of the state were sent to Salamanca Veterinary Laboratory for examination.

In each case the owner or importer of the cattle was informed what was being done.

[fol. 47] Complete reports of results of those retests were forwarded to this department by the person making them, and those reports are now in my possession and can be made available should the Court desire them.

These retests show the following results based upon all the animals thus arbitrarily selected for retesting, a total of 1521 cattle:

	No. tested	No. reacted	No. sus.	No. passed	% reacted	% susp.	% passed
Illinois	30	2	6	22	6.7	20.0	73.3
Indiana	3	0	0	3	0.0	0.0	100.0
Iowa	101	4	6	91	4.0	5.9	90.1
Michigan	98	6	10	82	6.1	10.2	83.7
Minnesota	106	9	8	89	8.5	7.5	84.0
Mississippi	127	28	15	84	22.0	11.8	66.1
Missouri	246	51	37	158	20.8	15.0	64.2
Ohio	173	29	15	129	16.7	8.7	74.6
Pennsylvania	57	7	6	44	12.3	10.5	77.2
Tennessee	181	17	14	150	9.4	7.7	82.9
Wisconsin	240	7	22	211	2.9	9.2	87.9
Canada	159	6	15	138	3.8	9.4	86.8
Total	1,521	166	154	1,201	10.9	10.1	79.0

It will be noted that of a total of 1,521 cattle all certified by the states of origin to have been tested and found negative within thirty days prior to shipment, and upon retesting soon after arrival in this state (in most cases immediately after arrival) only 1,201 or 79% were found negative upon the retest.

I believe that this data is accurate and representative. My reasons for believing this, besides the care which was taken in these retests to obtain accurate and representative results, are that the results are fairly comparable with the results obtained by Dr. Hardenburgh in retests under sim-
[fol. 48] ilar conditions in 1928-1929, and with some data obtained by Dr. Birch relative to a Cornell herd in 1928-1929.

Charles Linch.

Sworn to before me this 18th day of November, 1932.
Mary E. McAuliffe, Notary Public.

[fol. 48½] [File endorsement omitted.]

[fol. 49] Clerk's certificate to annexed paper omitted in printing.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN G. WILLS—Filed Nov. 19, 1932

STATE OF NEW YORK,
Albany County:

John G. Wills, being duly sworn, deposes and says:

I reside at Delmar, N. Y. In 1903 I received from the University of Vermont the degree of B. S. A., and in 1906 from Cornell University the degree of D. V. M. I am now employed by the Department of Agriculture and Markets of the State of New York as Chief Veterinarian (also known as State Veterinarian) and I have held that position continuously since 1911. My work has been of a professional nature in the study and control of infectious and contagious diseases of live stock.

I have been a member for the past twenty years and more of various organizations for the exchange of professional information among veterinarians and live stock sanitary officials, have attended many of their meetings, and have kept myself generally informed as to the trend of expert opinion, particularly relative to the prevention and control of infectious diseases of live stock. I have served as President of the New York State Veterinary Medical Society, and as President of the United States Live Stock Sanitary Association. Each is the representative organization in its particular field.

[fol. 51] The U. S. L. S. S. A. has among its membership the principal live stock sanitary officials of the federal and state governments. Each December in recent years it has held its annual meeting at Chicago. The proceedings at those annual meetings are printed by the Association and also in the Journal of the American Veterinary Medical Association. Those proceedings, and particularly the committee reports, are representative of the best professional thought within their field.

For several years the U. S. L. S. S. A. has had a Committee on Bovine Infectious Abortion, composed of federal and state officials. The report presented by that committee, and adopted by the Association at its 1925 meeting said, after first reciting that it took twenty years of individual and diverse action by the states for the control of bovine tuberculosis before the "accredited herd plan" became generally accepted:

"It is time that every state here or elsewhere represented, should consider the ravages of bovine infectious abortion and institute some control measures, taking into account the known facts concerning the disease and such measures should be applicable to the conditions of the cattle industry in the respective commonwealth-. * * * Some states have already made a start. Georgia, South Carolina and most recently Arkansas, have regulations requiring a health certificate for all animals imported into their domains. Pennsylvania has a plan for the control of bovine infectious abortion. A few other states have some form of regulation. In most of these latter cases the regulations are overlooked or not enforced. The great majority of states do not have any plan for the control of this disease.

"The time has come we believe when a concentrated effort should be made in all the states of this Union to reduce the losses resulting from bovine infectious abortion. It is absolutely not feasible to attempt at the present time to adopt a uniform plan for the control of this infection. We believe that sometime in the future it will be possible to formulate and place in effect a uniform method for the control of this disease, but at the present time each state should work out its own system, which is most adaptable to its particular conditions. The point we wish to emphasize most is, that now we should take some official cognizance of bovine infectious abortion, and further that [fol. 52] this should be done by educational or control measures, which are really active and not merely so many meaningless words or phrases, which are as dead as the paper upon which they are written."

The same report said:

"We desire to emphasize that the sera reactions for bovine infectious abortion are reliable. True they do have

certain weaknesses but that can be said about any biological test. The greater extent to which they are being used by practitioners as pointed out by your committee last year, is an indication of their worth, and also the breeders appreciate their value and are requesting that their herds be tested."

Two years later (December, 1927) the same organization adopted a further report of the committee. Among other statements, were the following:

"Your Committee has received a reply from the sanitary officer in charge of live stock disease control in every state of the Union. * * * Nine states have adopted specific control measures. These vary markedly depending upon local conditions. Some of the state legislatures have enacted definite statutes, while others are regulations of the live stock authorities of the respective commonwealths. Educational or demonstrational work of some kind is being carried out in twenty-three additional states. This leaves but sixteen states in which little, if anything, is being done. * * * Some of our southern states, as Arkansas, South Carolina, and Georgia, have regulations or laws requiring that all cattle transported or otherwise brought into the state must show on the health certificate that they have satisfactorily passed a blood test for bovine infectious abortion. * * * Laws and regulations tending toward the prevention and control of bovine infectious abortion are being adopted each year by the legislatures and animal disease control organizations of certain states. States which are not safeguarding the herds within their confines from further infection, or which are not attempting some measures tending toward the control of the infection already present, are now decidedly in the minority. The control officials in these states should study their local situation and adopt procedures which will either prevent infection in a clean territory or control the existing disease. * * * The reliability of the blood tests as methods of diagnosis has been clearly shown. Certain limitations of the tests have been pointed out and their value in the control of this [fol. 53] disease is definitely established. * * * It is not yet time to recommend uniform methods of control. Many states are doing a pioneer work demonstrating the efficiency of their control measures. States which are doing

nothing to protect their herds will soon find themselves in a serious situation."

In December, 1928, the U. S. L. S. S. A. adopted a report of its committee which included the following statements:

"It seems to your committee that there is a growing interest in specific state legislation or in a realization that general legislation may and must be used to control Bang's disease. * * * Regulatory officials are not ready for uniform legislation or regulations to control this disease. * * * To sanitary boards or officials in the various states which support a large cattle population, especially the dairy states, we recommend * * * recognition of the fact that a clean test of an individual which comes from an infected "unit, or a unit of unknown status, is a meager guarantee of safety to the purchaser."

During the discussion upon that report Dr. J. W. Connaway, in charge of Veterinary Science at the University of Missouri Experiment Station, made the statement that he had not favored any legislation in Missouri against cattle coming from other states, as he hoped the federal government would undertake the interstate control of the disease, but because some of the Wisconsin breeders had been "unloading" into Missouri their cattle infected with Bang's disease, recently the Holstein Association of Missouri had petitioned the legislature to enact a quarantine law.

At its 1929 meeting the U. S. L. S. S. A. heard a paper by John G. Hardenburgh, on "Buying Replacement Cows Free from Brucella Abortus Infection." Dr. Hardenburgh was Director of Laboratories for Walker-Gordon Laboratory Company of Plainsboro, N. J., and his paper was an account of experiences during 1928 and 1929 in buying tested and supposedly disease free cattle for three large dairy herds producing certified milk.

These herds comprised about 1,400, 400 and 375 mature cows, respectively, and the initial tests upon this stock showed positive reactions for about 35% of the animals. [fol. 54] Of 308 animals purchased during 1928 from six different states and Canada, without tests, 25.6% were positive.

However, fifteen loads of cows were purchased from June, 1928, to August, 1929 (a total of 485 cows) all subject to tests performed by official state or university laboratories. They were immediately tested upon receipt, and 49 cows, or 10% of the total, showed a positive reaction.

After that the certificates of tests performed in other states were no longer accepted. Dr. Hardenburgh stated the matter as follows, which is of immediate interest because his reference undoubtedly was to Wisconsin:

"In the summer of 1929, it became necessary to revise the system of testing cows prior to purchase. This was partly due to the fact that in one state where a considerable number of replacements are obtained, the control of Bang's abortion disease was placed in the hands of the "practicing veterinarians under the supervision of the state live stock sanitary officials. This control work included the actual agglutination testing of herds by the veterinarians themselves."

Accordingly, thereafter no cattle were purchased without a blood sample having been tested by the Walker-Gordon Laboratories as well as in the state of origin. Of twelve carloads (a total of 377 cows) purchased during the summer of 1929 under that method, the retests upon receipt disclosed only six reactors, or 1.6%.

But these retests upon receipt did not exhaust the possibility of error in the original tests. Dr. Hardenburgh stated this matter as follows:

"This work was undertaken with recognition of the facts that one hundred per cent results could not be expected, that one test on cows from previously untested herds is meager guarantee of permanent safety, and that a few cows purchased as negative would be positive after calving. * * * Practically all cows purchased under this system are in advanced stages of gestation and calve as a rule within one week to two months after receipt. It has been our practice to retest these replacement cows not sooner [fol. 55] than twenty days after calving; the same is done with all herd cows. * * * Of 716 replacements negative to the blood test [after receipt] that had freshened at the time of compiling the data, 30 (4.2 per cent) gave positive reactions; of 746 cows in the herd one year or more that

calved during the same period, 19 (2.5 per cent) gave positive reactions."

At this same meeting of the U. S. L. S. S. A. in December, 1929, it adopted a report, in part as follows:

"Control of bovine infectious abortion has proceeded satisfactorily during the past year. * * * Nine states and the Territory of Hawaii require a health certificate based upon the blood test. Seven additional states will not permit the entrance of animals which are known to give a positive reaction to the serological test for Bang's disease. Nineteen states have definite regulations governing the control of infectious abortion. Twenty-four states still have no regulations regarding the disease, but it is interesting to note that sixteen out of these twenty-four have regulations which they are about to adopt or are pursuing educational campaigns working towards the control of this infection. Six states prohibit the sale of known infected animals within their confines, except under permit from the live stock sanitary authorities. Eleven states are doing work on the accreditation of herds free of Bang's disease.

"The progress that has been made during the past year indicates that nearly all of our commonwealths are fully aware of the dangers of this infection and are formulating rules and regulations looking towards its control. As was pointed out by your Committee several years ago, each state has its own individual problem and as your Committee advised, each sanitary official should study his own problem and put into effect rules and regulations which are advisable under the circumstances that exist in his state. The above report indicates that sanitary officials, in general, have done this."

At the 1930 meeting of the U. S. L. S. S. A. Dr. A. E. Wright, Chief of the Tuberculosis Eradication Division, B. A. I., U. S. Department of Agriculture, addressed the Association and made the following statements:

[fol. 56] "Much still remains to be done in developing more satisfactory regulations pertaining to the interstate movement of cattle in order to prevent the spread of bovine infectious abortion. No doubt, as time goes on, we shall witness a decided improvement in this connection. Before

the advent of the motor truck the movement of live stock was principally by railroads, but today the situation is different. Each live stock sanitary official has a tremendous problem in controlling the transportation of live stock by truck, so as to prevent the spread of contagious diseases in live stock.

"The economic importance of abortion disease has reached a point where it becomes necessary to devote more time and consideration to its control and elimination. The disease is apparently very widespread throughout the United States, and probably causes a greater loss to the cattle-raisers than any other disease with which they have to contend. We are conscious that much work has been done in the study of abortion disease, and equally aware that the program of research is now receiving more attention throughout the country than at any time in the past.

"It is also of much interest to note that considerable progress is being made towards the establishment of abortion-free herds of cattle in various parts of the country. The owners of live stock are apparently ready to accept any sound plan that may be advanced to place this disease under control. With the increased resources now available to carry on research work in the laboratories and experiment stations, as well as to carry the projects to the people throughout the country, there is encouragement that some method will be developed within a few years so that abortion disease may be effectively controlled and eventually eradicated. This Association can be one of the greatest factors in hastening the attainment of such results."

Several papers were read upon various aspects of the abortion problem, one of them being by Dr. Wisnicky, of the Wisconsin Department of Agriculture and Markets, who described the method of control in that state. He said that approximately 15% of Wisconsin's three million cattle have Bang's disease, and it causes a loss of three million dollars annually. He said also:

"There is one feature in our Bang's disease control program which has all the aspects of being original with our state. This new feature is the performance of the serologic diagnostic tests made for the disease by the veterinary practitioners approved by the State Department of Agriculture and Markets. * * * Instead of having the actual

blood-testing done by a centralized laboratory, this testing, [fol. 57] along with other features of control, is executed by the qualified local practitioner. The local practitioner obtains the blood samples, properly identifies them, tests them, and then personally outlines the plan of procedure in each instance. * * * Various arguments have been raised against the veterinarian making the test in the field, the chief of which has been that the practitioner is not capable of properly performing and interpreting the test. With our method of instructing and supervising the work we find that practitioners are quite competent in both making and interpreting the test as well as directing the sanitary procedure on the farm. Our experience has been that the cattle-owner prefers to employ the local veterinarian whom in most instances he knows both professionally and socially and in whom he has implicit confidence. The veterinarian, likewise, senses the full measure of his responsibility and consequently performs the work with exacting care and accuracy, not only because he aims to render efficient service to his friend and client, but also because the future will reveal in no uncertain way whether such service was intelligently and accurately rendered."

A report was adopted which contained the following paragraph:

"The action taken by numerous states during the last year with reference to the exclusion of Bang-diseased cattle intended for breeding or dairy purposes reflects growing interest in and alertness to the fact that its menacing nature cannot economically be ignored. At present eighteen states and the Territory of Hawaii require that dairy or breeding cattle offered for entry into their confines shall have successfully passed a blood test or shall have come from Bang disease-free, accredited herds. In addition to those there are eleven other states which prohibit the entry of infected animals, except under special permit. When properly enforced, it is reasonable to assume that these regulations have had the effect of retarding the dissemination of the disease to a considerable extent. At any rate, they have emphasized its importance and been 'the means of prompting efforts on the part of many stock-owners to grapple with the problem more vigorously.' "

Dr. R. R. Birch of the N. Y. S. Veterinary College was called upon to discuss the report, and in the course of his discussion adverted to the Wisconsin plan and said:

[fol. 58] "I do not care to express an opinion regarding the use of the rapid test by the practicing veterinarian. If it proves to be an accurate test, if it is well interpreted in the field, and if the service goes with it which should go with any well interpreted test, it will be a fine thing. If those things fail we must fall back on the laboratories. I am very sure that some practicing veterinarians do not want to be bothered with the test, for it does not always dovetail well with busy practice. Also there are those practitioners who do not care to accept the responsibility of testing their client's cattle for interstate shipment. Future experience must determine just what plan is best. I suggest, though, that practicing veterinarians, during the first year or two, be very careful to check up with some laboratory which has been in operation for some time and in which much routine testing is being done."

Dr. Birch also compared the characteristics of bovine tuberculosis and Bang's disease, and pointed out that there should be more emphasis on herd history and less reliance upon a negative test for the individual animal. He said:

"We can't handle it [Bang's disease] exactly as we handle tuberculosis. Even with the latter disease we get into trouble enough in individual testing which ignores the herd status and our troubles will be multiplied if we rely on individual testing with Bang abortion disease. * * * The law which prevents transportation of reactors to the agglutination test from one state to another certainly is building up a false sense of security among those who purchase clean cattle. I am speaking of the individual test, which ignores the status of the herd from which the animals are purchased. If anyone thinks he can go into some distant state and buy mature animals on individual test and keep them testing clean, he will change his mind after he tries it a few times. * * * We really must know three things if we are going to use the agglutination test successfully in the purchase of cattle. We must know the status of the contact animals in the herd from which the animals came. We must know of course how the trans-

ferred cow herself tests; and then we must know the status of the herd into which she is introduced. This law puts all the emphasis on the animal which is shipped. I believe that as time goes on this defect will be recognized and corrected."

Dr. J. W. Connaway said that some sections of the country were free from Bang's disease, and would be endangered if infected cattle could be shipped. He said:

[fol. 59] "If we follow the suggestions which Dr. Birch has made, there would be a good deal of peddling of infected cattle from state to state. People cleaning up their herds, many of them, want to get rid of those animals, and speculators who can buy them up cheaply gather them into bunches and ship them out into other states. * * * Our regulations should be strengthened rather than slackened on this matter. * * * Those infected animals ought to stay at home. There ought to be no means whatever that would permit thoes infected cows to get away from the farms where they were bred and where the owner knows how to handle them and go off into other states and start new infections in clean territory."

Dr. Birch responded:

"The thing I want to call attention to is the fact that shipping these clean cattle on individual tests into that [clean] territory would be one of the most certain ways to produce disaster in that territory that could possibly be devised. * * * That district will certainly become infected if animals are bought on individual tests from infected herds and sent down there."

At the last meeting of the U. S. L. S. S. A., in December, 1931, considerable attention was given to Bang's disease. The report on that topic was not adopted, but was referred back to the committee for further consideration. The following are quotations from it:

"Approximately 10,000,000 of the 56,000,000 cattle in the United States are affected with Bang's disease. * * *

Between 50 and 60 per cent of the herds are thought to be harboring infection in some degree.

"Thirty states have interstate regulations which prohibit the introduction of cattle unless they meet with the regulations pertaining to Bang's disease. Twenty-three states definitely prohibit the introduction of cattle unless they have passed a negative test to Bang's disease prior to shipment. Seven states will not accept cattle which are known reactors to a test for Bang's disease, except by a special permit or for immediate slaughter.

[fol. 60] "The interstate regulations promulgated by the various states have the same object in view, and in a general way the provisions are somewhat similar. There are, nevertheless, variations concerning certain features pertaining to the kind of test to be used, age of the animals which must be tested, the number of days within which the test must be conducted prior to shipment, etc. The differences in the regulations pertaining to this disease are not sufficient to be of serious consequence to cattle-owners moving animals from one state to another. In fact, similar differences exist pertaining to the regulations concerning the tuberculin test. Some states still will not accept the single intradermic test, while most of the states recognize it. The interstate regulations which the thirty states have promulgated serve as a large factor in compelling the herd-owners' attention to the disease. They likewise offer a certain measure of protection, although to obtain the full value indicated by these regulations, considerable educational work must go along with them.

"The purchase of a negative animal from an infected herd does not grant the security which the owner may be led to believe. He should be appraised that this negative animal should not be put into an infected herd. He should further be advised that it should not enter a clean herd until it has served a period in quarantine and been retested and found to be negative."

"There is every indication that Bang's disease is a serious menace to the cattle-breeding industry. Our knowledge concerning some of the phases of this disease is still incomplete, although the subject has been carefully and consistently studied by the most highly trained and skillful scientists in many countries. It is known, with the knowledge now available, that cattle-owners can control the spread

of this disease and materially reduce their loss by strict attention to sanitation in connection with the proper use of the agglutination test. When the benefits from these measures become more generally understood, a demand will follow for more progressive measures and, with the support and cooperation of the cattle-owners, it will be possible to eliminate the disease."

"Your Committee suggests the following uniform regulations for he interstate movement of dairy and breeding cattle:

[fol. 61] "No dairy or breeding cattle shall be shipped, driven on foot or otherwise transported interstate except upon the following conditions: (1) That such cattle are moved interstate to public livestock markets where federal inspection of livestock is maintained. (2) That such cattle come from a herd which has been officially certified as a Bang disease free herd by the state in which the cattle originated. (3) Unless such cattle have been tested within 30 days prior to date of movement, by the agglutination test for Bang's disease, and shown to be free from such disease, such test not to be applied within 15 days from date of calving."

Dr. R. R. Birch commened on that report as follows:

"Placing importations on the basis of the clean herd is essential if we are to progress. As far as individual states are concerned, steers and cattle for immediate slaughter may be admitted without test. Pure-bred bulls, young unbred heifers and cattle from *clean herds* under satisfactory supervision in other states may be admitted on individual test with reasonable safety. I believe that mature breeding females from herds of unknown status or from those known to contain reactors should be admitted only under special permit. These points I conceive to be the basis of regulations which really will be effective but some latitude will be found necessary if each state meets its own individual problem.

"I am sure the weak point in most regulations in force today is that they admit all individuals that test clean regardless of whether they come from clean herds. Bulls and unbred heifers may be accepted on this basis with a degree of safety because they do not break down rapidly and be-

come spreaders but the reverse is true of mature breeding females. Those of us who have been engaged in cleaning up herds and keeping them clean know perfectly well that we cannot, without great danger, move into our clean herds mature breeding females from infected herds or from herds of unknown status even though the transferred animals test clean. Yet, the regulations in most of our states place the official stamp of approval on this practice, which naturally leads purchasers to believe it is a safe procedure.

"I hope when our Committee gets to work it will, as Doctor Connaway has suggested, build its recommendations on these known facts. We are misleading our breeders and causing them heavy and unnecessary losses until we abandon the test of the individual (with the exceptions mentioned) as a basis for interherd and interstate transfer."

[fol. 62] "For a number of years the American Veterinary Medical Association has had a Committee on Bang's Disease. At the meeting in August, 1931, at Kansas City, its report was adopted, in part as follows:

"Twenty states have regulations requiring that breeding and dairy cattle pass negative blood tests before entering them, and fourteen others prohibit the entry of reactors. Only a few states have no interstate regulations. Cattle owners, as well as sanitary officials, and practicing veterinarians, complain chiefly of a lack of uniformity in interstate requirements.

"It is apparent that greater support should be given by the federal government to the Bang's disease control programs of the individual states. A cooperative plan between the federal government and the individual states should help considerably toward bringing about uniformity of plans in the states, uniformity of interstate regulations and uniformity in the disposal of reactors.

"In the execution of a plan of Bang's disease control, based on the agglutination test, a number of important essentials should be considered: * * * Special care should be exercised by the veterinarian to guard against the creating of a sense of false security as to the infallibility of a single blood test. No herd should be considered free from Bang's disease until all animals in it have been negative to repeated tests covering a period of at least one year.

Some pregnant animals do not react their first time, until after they have calved or aborted."

"Herd additions. * * * The ideal replacements are animals from clean herds, preferably calves. * * * Pregnant animals from other than clean herds should not be added until after having passed a negative test, at least two weeks subsequent to calving. All other herd additions, bulls and open cows should have passed negative to two blood tests with a sixty-day interval."

A year later (August, 1932) meeting at Atlanta, Georgia, the A. V. M. A. adopted a majority report presented by M. F. Barnes, B. J. Killham, W. A. Axby and W. Wisnicky, and rejected a minority report by Dr. W. E. Cotton. The following is the complete text of the majority report:

[fol. 63] "Your Committee this year can report no outstanding new developments in Bang's disease control; yet, the work of the year is encouraging. Efforts to free herds from infection by blood-testing and the elimination of reactors have increased and have met with success. There is evidence that, with the proper execution of such measures, the disease can be eradicated; however, the procedure followed must be somewhat modified to suit conditions existing in individual herds. In extensively infected herds the building of a new herd from the offspring is probably the best course to pursue. Bang's disease control is important from the standpoints of efficiency and economy in maintaining herds for dairy and breeding purposes and the production of beef.

"Your Committee is cognizant of the fact that Bang's disease bears some relation to public health but probably less than has previously been indicated.

"Thirty-two (32) states now have plans for Bang's disease control. Thirty (30) states place restrictions on reactors, of which 19 do not quarantine but require that either the reactors be slaughtered, sold as reactors, or placed in infected herds. Five (5) states having plans place no restrictions on the reactors, while 4 states having no plan place restrictions on reactors.

"Twenty-nine (29) states require a negative test for entry of cattle into these states. Twenty-one (21) of these states requiring a negative test have a plan within the state,

while 8 of them have no plan. Ten (10) states do not accept a test within 15 days subsequent to calving; 2 do not accept within 21 days; 1 state (Alabama) does not accept a test on pregnant animals within 4 months of delivery and not until 21 days subsequent to calving. Forty-one (41) states forbid the entry of reacting animals. Twenty-nine (29) of these have plans and 12 have no plan.

"Some states have made greater progress than others in the control by blood-testing and the elimination of reactors. Data were collected from eleven states having a definite plan of control. Some of these states have been testing for longer periods than others, but the results which have been obtained in the newer states are encouraging.

Massachusetts has tested 16 herds and issued 10 certificates.

Maryland has tested 50 herds and issued 5 certificates.

New Jersey has tested 134 herds and issued 30 certificates.

North Carolina has tested 150 herds and issued 27 certificates.

Indiana has tested 163 herds and issued 41 certificates.

Michigan has tested 190 herds and issued 31 certificates.

Montana has tested 193 herds and issued 2 certificates.

Illinois has tested 750 herds and issued 56 certificates.

Wisconsin has tested 2,310 herds and issued 144 certificates.

Pennsylvania has tested 5,730 herds and issued 756 certificates.

[fol. 64] "Minnesota has 1,693 herds operating under its "A," "B" and "C" plans, and has 30 accredited herds under the "A" plan and 230 approved Bang-abortion-free herds under the "B" plan.

"The only successful method yet demonstrated of eliminating Bang's disease from infected herds is through the use of the agglutination test and the elimination of reactors. This test, regularly applied, along with the elimination of reactors, and sanitation, has been an accepted method of Bang's disease control for a number of years, and has been stressed in recent reports by this Committee as the basis upon which free herds can be established and maintained. Last year's report pointed out fundamental essentials

necessary in the execution of this tried and proved plan of Bang's disease control. These essentials still remain fundamental to the successful elimination of Bang's disease from any herd.

"Some states are making apparent progress by having practitioners test through the use of the plate test. However, most states having a plan use the tube method or recognize as official only the tests done by the state. The latter procedure is a protection to the practitioner and does not interfere with his cooperation in the execution of a cooperative plan of Bang's disease control, wherein it becomes his duty to collect the blood and advise with the owner concerning the management of the herd. The state assumes the responsibility of determining which animals are reactors and their disposal; also, the state conducts the testing under uniform conditions, with a standard antigen, which should insure uniform results in the different herds. In all cases, the live stock sanitary official of the state is responsible and should not issue a certificate until the herd has been check-tested by the state.

"Antigens used in the test are the subject of considerable discussion. The majority of the Committee were of the opinion that steps should be taken to encourage the adoption of a uniform standard of production and use of antigens. Inasmuch as antigens for Bang's disease testing are not among those for which a federal veterinary license is required before they may be shipped in interstate trade, it is recommended that each state having a plan for Bang's disease testing adopt standard antigen requirements, making all antigens used within the state conform to one standard. States should prepare antigens or supervise their preparation and should accept commercial antigens only after compliance with a specified standard.

[fol. 65] "It is suggested that all states require identification of reactors and forbid their entry into negative herds. Owners who add cattle to restock their herds after the removal of reactors to the tuberculin test, or for other reasons, should make sure that Bang's disease is not introduced into herds previously free.

"Studies on the modes of infection have shown that conjunctival exposure is a positive way of infecting susceptible animals artificially, and experimental infection through the

unbroken skin is successful to a considerable degree. The potitiveness of the conjunctival route of infection makes it particularly useful in researches. Whether or not either of these modes of infection is of importance under natural conditions has not been determined.

"Medicinal agents offer little or no encouragement in the control of Bang's disease, but experimental studies on this phase of the subject should continue. It is encouraging that some of the best farm papers are not advertising so-called 'cures.'

"Vaccines are still in the experimental stage and should not be used except under official supervision. The possibility of securing a suitable vaccine should not be discarded until it is definitely proven that vaccines will not serve a useful purpose, or, until further research proves them to be sufficiently efficacious with freedom from danger to man and animals.

"The question of abortions due to causes other than *Brucella abortus* is not easy of attack, but in exceptional herds is so discouraging that its study merits attention.

"It is realized that there are many questions that need solution, and your Committee suggests the continuance of a constructive research program on Bang's disease from every standpoint."

In May, 1930, there was held at Ithaca, N. Y., a Conference on Infectious Abortion, representing the Northeastern States through their commissioners of agriculture, directors of experiment stations, professors of veterinary science, and others having an official and professional relation to the problem. That conference adopted a report submitted by Dr. J. H. McNeil, Chief, B. A. I. of New Jersey; Dean G. C. White, Conn. Ag. College; Dr. C. C. Palmer, U. of Delaware; Dr. John D. Lentz, Mass. Ag. College; and Dr. Carl N. Martin, U. of New Hampshire. One paragraph of that report was as follows:

[fol. 66] "The interstate selling of alleged Bang's disease-free animals will probably assume increased importance, and for the protection of purchasers within a state it is urged that state officials recognize no animal as free from Bang's disease until it has come from a Bang's disease-free herd,

and that it has come into contact, enroute, with no animal other than in or from a Bang's disease-free herd."

In November, 1931, a similar conference was held at Trenton, N. J. Various papers were read, among them one by Dr. Herbert L. Gilman, Veterinary College, Cornell University, upon, "What Should Constitute a Satisfactory Test for Interstate Shipment." He laid some emphasis upon the need for information about the status of the herd from which animals were drawn. He said:

"The animal agglutinating at 1:50 from a herd known to have been free from the disease for some time is a far more desirable individual than a non-reactor or one with a titre of 1:25 that has been picked at random from a positive herd or one of unknown status. * * * These same requirements should be just as satisfactory for interstate shipment if we will stress the necessity of knowing not only the titre of the cow but also the status of the herd from which the animal comes."

Dr. Gilman's paper concluded:

"It is strongly recommended that the status of the herd from which the animal comes should be stated on the chart."

In discussing that paper, Dr. Hendershott of the New Jersey Department of Agriculture said:

"I do believe if we knew the history of the herds from which cattle are being chosen for importation into a state, we might perhaps put a different interpretation on the reaction in the 1:25 dilution * * *."

Dr. W. E. Cotton, one of the leading experts relative to this disease, employed by the federal B. A. I. as Superintendent of its Experiment Station at Bethesda, Md., read a paper on "How Far Can the Agglutination Test be Relied on to Detect Abortion-Disease Infected Animals?" He said that experiments had indicated that reaction varies from [fol. 67] 9 to 120 days after infection, apparently depending somewhat upon the manner of infection. When infection was through the digestive tract, the average time until the animal would show a reaction to the agglutination test was about sixty days. He concluded his paper with the following statement:

"In its present state of development, the agglutination test for Bang's disease has proved to be a very useful one and is accomplishing much good in connection with the control of the disease in individual herds, and its eradication from them, and also in preventing the introduction of infected animals into clean herds; work that would be next to or quite impossible without it. The information given, however, lacks precision and reliability to such a degree that it promises to be very difficult, with the present lack of uniformity and standardization, to rigidly enforce general regulations for the interstate movement of cattle."

In the discussion which followed, Dr. Wiznicky of Wisconsin and Dr. Barnes of Pennsylvania said they had greater confidence in the agglutination test than Dr. Cotton appeared to have.

Dr. Birch read a paper on "Some Principles Underlying Official Regulations for Bank's Disease." At the outset he listed 17 points of comparison between bovine tuberculosis and Bang's disease, some being similarities and some differences, affecting control methods for each. Later he said:

"The usual state law merely dictates that all imported cattle shall not react to the agglutination test. Its chief justification rests on the oft-repeated statement that the state concerned does not want to be the dumping ground for reacting cattle from other states. There always have been, there always will be, serious difficulties with laws of this character. I do not pretend to say whether they contain more of good than of bad, but choose rather to accept the most charitable view which the facts justify—that they may possibly constitute a very feeble step in the right direction. Deep-seated defects in laws of this character are: 1. They exclude animals which actually react, but admit exposed animals from infected herds. 2. They place the official stamp of approval on exposed non-reactors, animals which our most progressive breeders have learned through bitter experience to avoid. 3. They place all the emphasis [fol. 68] of the transferred animal and ignore the fact that all intelligent inter-herd transfers rest as well on knowledge of the herd which furnishes, and the one which receives the transferred animal. 4. They deny the owner of a badly infected herd the privilege of recruiting his herd with reacting animals purchased outside the state. * * *

"The state that permits importations from infected or untested herds, even though the imported animals test clean as individuals, will always be the dumping ground for highly dangerous animals even though all animals are excluded which show the slightest trace of agglutination in the lowest dilution. There is little difference between importing, say, a dozen reacting cows and importing a dozen non-reacting cows which come from infected herds, if the latter group includes exposed individuals which later will react and spread the infection to the entire group. We must exclude the infection instead of admitting it in disguise, and this can be accomplished only when we make the clean herd the basis of transfers.

"An individual animal whose blood serum agglutinates as high as 1-40 and which comes from a herd fortified by a succession of tests in which no individual has recently shown agglutination in higher dilutions, is infinitely less likely to carry latent infection than is the one showing no agglutination whatever, but which comes from an infected herd. This is an exceedingly important point which in justice to my audience I must support with pertinent data."

After giving some figures based upon tests and retests of eleven herds totalling 403 animals, he stated his conclusions from that data, and proceeded, as follows:

"This record makes it clear that a titer of 1-40 is exceedingly common in normal individuals, and that it involves no threat of danger when it occurs in individuals which come from herds in which no higher agglutinations exist, or have recently existed.

"Now let us examine the hazards which may be encountered in purchasing negative animals from infected herds. For this purpose we submit the record of a typical herd in which Bang's disease was spreading. In December, 1928, we tested a herd consisting of 94 head, 9 of which were definite reactors. There were 68 animals, clean according to our interpretation, which agglutinated at 1-40 or [fol. 69] below and which remained in the herd for a subsequent test which was made in October, 1929, ten months later. During the interval 35 new reactors had appeared. Of these, 8 had been completely negative with 1-20 as a minimum dilution, at the first test. The others had shown

maximum dilutions as follows: 17 complete at 1-20; 5 partial at 1-40; 5 complete at 1-40. When we remember that the average period between the time when an animal acquires infection and that when a definite reaction appears is probably about six weeks, we can readily understand that it would have been virtually impossible to purchase even small groups from this herd during the ten-month interval covered by the tests without including individuals that subsequently would have reacted. Yet every state law in force today would have accepted individuals from this herd during the interval of acute danger, and some of them would have refused to accept animals from the clean herds included in our tests.

"Officially, we are not yet waging war against Bang's disease. We are merely sniping or conducting a hit or miss guerrilla warfare. The real campaign will begin only when the officially recorded herd is made the nucleus of interherd and interstate transfers, when the maintenance of clean herds within the state receives chief consideration, and when the guidance rather than the prevention of the movement of infected cattle is accepted as an official policy."

In the general discussion which followed, Dr. Cotton conceded that there was force in Dr. Birch's point about the danger of buying non-reacting cattle from infected herds. Dr. Wiznicky mentioned the fact that in Wisconsin the cattle owner bears all, or nearly all, the expense of the efforts to control and eliminate Bang's disease.

Dr. J. H. McNeil, Chief, B. A. I., New Jersey Department of Agriculture, read a paper in the course of which he said:

"Inasmuch as the Federal Department of Agriculture has not promulgated regulations requiring the agglutination test for the movement of cattle interstate, it is necessary for each state, in order to protect the cattle industry, to enact laws upon which to base rules and regulations for the handling of this disease within its borders.

[fol. 70] "At the present time twenty-one states have either by regislative enactment or quarantine regulation required an agglutination test for all dairy and breeding cattle entering their state. There are eleven states in addition which have regulations restricting the movement into the state of animals positive to the agglutination test. How-

ever, it is unfortunate that the regulations are not uniform and we recommend that immediate action be taken to bring about a standardization not only of the tests, but the methods of handling animals positive to the agglutination test."

All of the foregoing I have presented as being representative of facts publicly presented and opinions publicly avowed relative to Bang's disease by persons of veracity and expert information, whose opinions in this field are entitled to great respect. I believe that the foregoing statements all are of the character indicated, that they show the development of expert opinion during the last eight years, and that in general and in mass they represent the best information now available upon which to base a program for th econtrol and eradication of Bang's disease.

John G. Wills.

Sworn to before me this 18th day of November, 1932.
Mary E. McAulliffe, Notary Public.

[fol. 70½] [File endorsement omitted.]

[fol. 71] Clerk's certificate to annexed paper omitted in printing.

[fol. 72] In United States District Court

[Title omitted]

Affidavit of Raymond R. Birch—Filed Nov. 19, 1932

State of New York,
Albany County:

Raymond R. Birch, being duly sworn, deposes and says:

I reside at Ithaca, New York. In 1906 I received the degree of B. S. from the Kansas State Agricultural College, in 1912 the degree of D. V. M. from Cornell University, and in 1916 the degree of Ph. D. from Cornell University. I was in sanitary work in the Philippines from 1906 to 1908, and since 1916 have been professor in charge of the Veterinary Experiment Station, Cornell University, Ithaca, N. Y.

My duties have been of professional nature. I am a member of the American Veterinary Medical Association, the United States Livestock Sanitary Association, and other scientific societies. I have attended the meetings of these societies regularly, have often appeared on their programs, and have served frequently on special committees, particularly those relating to Bang's disease of cattle and swine diseases.

Since 1921 my major research problem has been Bang's disease of cattle. I have investigated methods of transmission, methods of identifying infected animals, including the agglutination test, the incubation period, and numerous [fol. 73] other fundamental phases of the disease, I have paid particular attention to field methods of control of Bang's disease, and have at the present time approximately 40 herds under my personal supervision that are using the agglutination test as a basis for their method of control. Approximately 10,000 agglutination tests are made in my department each year in connection with these herds.

My research papers and other publications on Bang's disease appear in the Reports of the New York State Veterinary College, in the Cornell Veterinarian, in the reports of the U. S. Livestock Sanitary Association, and in the Journal of the American Veterinary Association.

I have been in a position to direct and observe methods of control in the field, to discern certain failures and to ascertain their causes.

I do not regard the order of March 31, permitting the entrance of cattle into New York State on the basis of one clean test of individuals coming from infected herds, or from herds of unknown status, as sound sanitary procedure. I have frequently in addresses and publications pointed out that the clean-testing cow that comes from an infected herd often is in the incubative stages of the disease, and will later react and spread the infection into herds into which she is introduced. I appeared at a hearing held before the issuance of the order of March 31, and urged that the clean herd instead of the clean testing individual be made the basis for the entry of cattle into New York State. This position was taken because I repeatedly have observed in herds containing reactors, the appearance of many new reactors in successive herd tests made less than two months apart. These new reactors had they been

in another State, would have been admitted into New York State on the basis of previous clean tests but would have been reacting and highly dangerous less than two months subsequent to the clean tests.

[fol. 74] I regard the order effective October 1, which places importations on the basis of the clean herd, as the most effective means of protecting New York State's breeders.

Raymond R. Birch.

Sworn to before me this 19th day of November, 1932.
Mary E. McAuliffe, Notary Public.

[fol. 74½] [File endorsement omitted.]

[fol. 75] Clerk's certificate to annexed paper omitted in printing.

[fol. 76] In United States District Court, Northern District of New York

Aaron Mintz and Louis Mintz, Copartners, Doing Business under the Firm Name and Style of Mintz & Mintz, Plaintiffs,

against

Charles H. Baldwin, Individually and as Commissioner of Agriculture and Markets of the State of New York, Defendant

Before Augustus N. Hand, Circuit Judge, and Frank Cooper and Frederick H. Bryant, District Judges

Opinion—Filed Feb. 13, 1933

The plaintiffs are copartners doing business under the name of Mintz & Mintz in the States of Wisconsin, New Jersey and other States, and are engaged in the breeding and sale and transportation in interstate commerce of cattle for dairy and breeding purposes. Their cattle are purchased or bred and are located in the State of Wisconsin, whence they ship annually to buyers in the State of New York upwards of one thousand head. The defendant, Charles H. Baldwin, is Commissioner of Agriculture and

Markets of the State of New York and as such is chief executive officer of the New York Department of Agriculture and Markets. By Section 24 of the Agriculture and Markets Law the defendant is charged with the duty of [fol. 77] providing for the exercise of the powers and the performance of the duties of the Department of Agriculture and Markets and is authorized to make rules in respect to the same. On the 29th of August, 1932, the defendant, in pursuance of Sections 72 and 74 of the Agriculture and Markets Law of the State of New York promulgated an order to take effect October 1, 1932, providing that all bovine animals coming into the State of New York should comply with the following requirements:

"All cattle over six months of age imported for dairy or breeding purposes shall come directly from herds certified to be free from Bang's disease by the chief live stock sanitary official by whatever name known of the country, province or state of origin. Such animals at the time of import must be accompanied by a certificate authenticated by such livestock sanitary official showing the name and address of the laboratory or person making the last blood test on such herd with a complete statement of the results of such test on the animals so imported. Such certificate shall describe each animal in such manner as to enable its identification by ear tag number, name and registration number in the case of pure breds and ear tag number in the case of grades. Such certificate shall include or be accompanied by the certificate above mentioned as to freedom of the herd from Bang's disease. A duplicate of such authenticated certificate or certificates must be filed with the Department of Agriculture and Markets, Albany, N. Y., by the consignee at the time the shipment is received, unless such duplicate has previously been filed by the consignor.

"This order shall not apply to the following classes of bovine animals:

"(a) Cattle for immediate slaughter, consigned to the public stock yards.

"(b) Steers and beef type cattle for feeding and grazing purposes."

On or about the 21st day of October, 1932, the plaintiff shipped from the State of Wisconsin to one Edgar Bartlett,

at Sharon Station in the State of New York, twenty head of grade cattle for dairy or breeding purposes all over six [fol. 78] months of age, which at the time of their arrival at Sharon Station were accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin showing the name and address of the laboratory or person making the last blood test on said twenty head of cattle, with a complete statement that the results of such test showed each of said animals to be free from Bang's disease. The certificate described each of the cattle in such manner as to enable its identification by ear tag and a duplicate of the certificate was filed by plaintiffs with the Department of Agriculture and Markets in Albany, New York, on October 23, 1932. It did not certify that the herd from which these cattle came was free from Bang's disease, and because of this fact, the plaintiffs were forbidden by the New York Commissioner of Agriculture and Markets to deliver any of them to the purchaser Edgar Bartlett. The Commissioner ordered the railroad that transported them and still held them in custody to keep them separate from all other animals until inspection had been had and until the further order of the Commissioner, and forbade it to remove any of them from the place where they were except for immediate slaughter and forbade the sale or use of the milk from the animals until it had been heated to a specified temperature. By reason of the issuance of this last order, the plaintiffs felt obliged to reship the cattle and transported them to a point outside of the State of New York.

The bill of complaint alleged in addition to the foregoing that under the Act of Congress of February 2, 1903, (21 [fol. 79] U. S. Code §§ 120-121-122) and the Act of Congress of March 3, 1905, (21 U. S. Code §§ 123-124-125-126) Congress had assumed control of the entire field of transportation and quarantine of live stock which is the subject of commerce between the States in so far as action to prevent or lessen the spread of dangerous, contagious, infectious or communicable diseases is concerned, and that such control by Congress excluded from the field any action by the several States in respect thereto and rendered the order of the Commissioner of Agriculture and Markets void as in contravention of the provisions of the Interstate Commerce clause of the Constitution of the United States. The

bill of complaint also alleged that the Commissioner's regulations were an undue burden upon Interstate Commerce and thus in violation of the Constitution.

The complaint asks for both a preliminary and a final injunction restraining the defendant and his agents from enforcing the order and from subjecting to inspection, examination and quarantine after interstate transportation shall have been completed animals transported without a certificate that they have come from a herd free from Bang's disease.

An affidavit and the bill of complaint were submitted in support of the motion for a preliminary injunction and likewise answering affidavits were submitted on behalf of the defendants. These affidavits were by stipulation introduced at the final hearing as proofs on behalf of the respective parties. It is shown by the affidavits that Bang's disease is generally prevalent among dairy cattle throughout the nation, that it causes infected cows to lose their [fol. 80] young during the period of pregnancy and that it is one of the greatest limiting factors in dairy herds of the United States, both as to reproduction and milk yield; that the disease known as Undulant fever is caused by the presence of Bang's disease germs in the human body and that such infection can come about from drinking raw milk from an infected cow. It is also shown that Bang's disease may generally be diagnosed about sixty days after the infection of the animal, though the time may be considerably longer. The two blood tests which are customarily made to detect the disease may not disclose it if it is still in the incubative stage. A substantial percentage of cattle imported into New York State under certificate that they have passed tests for Bang's disease are shown to have been in fact infected. There is a body of expert opinion that such cattle should only be admitted when certified to have come from a clean herd and that by such a safeguard danger of infection would be greatly lessened.

Bang's disease is exceedingly infectious and the Commissioner of Agriculture and Markets concluded that in order to protect herd owners and milk consumers he should require a certificate not only that imported cattle showed no infection but that they came from herds free from disease. This conclusion resulted in the above order.

By reason of the danger of infection from Bang's disease many States of the Union have imposed restrictions upon the admission of cattle intended to mitigate the danger from Bang's disease. The United States Department of Agriculture has been aware of the legislation and regulation of the States in respect to Bang's disease, and, as late as November 15, 1932, declared its own policy in the follow-[fol. 81] ing letter to the defendant:

"Nov. 15, 1932.

"Hon. Charles H. Baldwin, Commissioner, Department of Agriculture and Markets, Albany, N. Y.

"Dear Mr. Baldwin: Referring to the visit of Dr. J. G. Wills, a representative of your office, with regard to the regulation and control of Bang's disease, also known as contagious abortion, you are advised that this Department has issued no quarantines or regulations pertaining to this disease. The Department is aware, however, that over twenty of the States have issued such regulations governing the importation of cattle into their States so as to prevent the introduction of this disease. The Department is disposed, for the present, to leave the control of Bang's disease with the various states.

"You may also be interested to know that there is now before the Congress a joint resolution, H. J. No. 12, which would allow the States to act with regard to any animal quarantine measure until such time as the Federal Government may issue regulations on the same subject matter. This Department is in sympathy with the provisions of that resolution.

"Sincerely yours, Arthur M. Hyde, Secretary."

Whalen, McNamee, Creble & Nichols, Solicitors for Plaintiffs; R. M. Orchard, Assistant Attorney General of Wisconsin, of counsel.

John J. Bennett, Jr., Attorney General of the State of New York, and Henry S. Manley, Solicitor for the Department of Agriculture and Markets, Solicitors for the defendant; Henry S. Manley, of counsel.

Augustus N. Hand, Circuit Judge:

The plaintiffs insist that the order of the New York Commissioner of Agriculture and Markets is invalid because it

involves a regulation of shipments in interstate commerce in a field which Congress has already occupied. The legislation which they regard as occupying the field comprises the Act of February 2, 1903, (21 U. S. Code, §§120, 121 and [fol. 82] 122) and the Act of March 3, 1905, (21 U. S. Code §§123, 124, 125 and 126).

Section One of the Act of 1903 authorizes and directs the Secretary of Agriculture to establish such rules and regulations as he may deem necessary concerning the exportation and transportation of live stock "from any place within the United States where he may have reason to believe" "dangerous, contagious, infectious and communicable diseases in cattle and other live stock" exist. The same section further provides that whenever an inspector of the Bureau of Animal Industry shall issue a certificate showing that he has inspected any cattle about to be shipped and has found them free from communicable disease they may be shipped "from such place into and through any State * * * without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture * * *."

Section One of the Act of March 3, 1905, authorizes and directs the Secretary of Agriculture to quarantine any State or portion thereof "when he shall determine the fact that cattle or other live stock" therein "are affected with any contagious, infectious or communicable disease; * * *." The succeeding sections provide that the Secretary shall make regulations for the inspection and shipment of cattle from the quarantined areas and that cattle may only be transported from such areas under conditions prescribed by the Secretary.

The Act of 1905 can hardly have any bearing on the present situation. It is a quarantine act and the sections are so entitled. Speaking of this Act, it was said by Judge [fol. 83] Grubb that: "Congress legislated, having in view the probable occurrence of epidemics of varying seriousness and intensity." United States v. Louisville etc R. Co., 176 Fed. 942, 947. It in terms only relates to cases where an area is quarantined after the Secretary of Agriculture has determined that cattle therein are affected with a contagious disease. Such determination is a condition precedent to the operation by the establishment of a quarantine. Whipp v. United States, 47 Fed. (2d) 496. There was no

such determination here, nor has any basis for such a determination been shown in the States from which the cattle were shipped.

Both the Act of 1903 and the Act of 1905 were before the Supreme Court in Asbell v. Kansas, 209 U. S. 251. There a statute of the State of Kansas made it a misdemeanor for any person to transport cattle into the State from the south without having them inspected and passed as healthy by the proper State officials or by the Bureau of Animal Industry of the United States. Asbell was convicted under the State Statute. Justice Moody, who wrote the opinion, said that: "The only Federal question * * * is whether the statute was a restriction of interstate commerce which was not within the power of a State to impose." It was held that the State might "enact laws for the inspection of animals coming from other States with the purpose of excluding those which are diseased and admitting those which are healthy" and the conviction was sustained. Justice Moody referred to the two Acts of Congress we have mentioned and remarked that the only provision relevant to the issues before the court was the one of the Act of 1903 that where a federal inspector had issued a certificate of [fol. 84] freedom from communicable disease, cattle might be transported in interstate commerce without further inspection and that since the Kansas Statute recognized this there was no conflict between the Act of Congress and the State Statute. A departmental regulation brought to the attention of the court was held to have no bearing because it related only to transportation from quarantined States, and no quarantine was there involved. In this decision we have a clear ruling that the States may pass inspection laws affecting the importation of cattle, at least where the Department of Agriculture has not acted in the matter.

But it is said that Asbell v. Kansas, supra, is in effect overruled by Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, and such was the holding of a three judge court in Must Hatch Incubator Co. v. Patterson, 27 Fed. (2d) 447. The Oregon-Washington case involved a federal quarantine act against farm produce likely to convey injurious insects from infested localities. The decision in Asbell v. Kansas, supra, was not discussed. A majority of the court held that the federal act was so broadly drawn as to show an intention of Congress to occupy the field and

to inhibit State quarantine legislation. The provisions of the federal plant quarantine act are not unlike those of the cattle quarantine act of 1905, and if a state quarantine statute were involved here, we might feel that the decision in the Oregon-Washington case was controlling. The Missouri Court of Appeals has held that State laws providing for interstate quarantine of cattle were superseded by the Act of 1905. State v. Chicago M. & St. P. Ry., 200 Mo. App. 109, 206 S. W. 419 (1918). But the contrary has generally been held. Ex parte Goddard, 44 Nev. 128, 190 [fol. 85] Pac. 916; Pecos & M. T. Ry. Co. v. Hall, 222 S. W. 170; St. Louis I. M. & S. Ry. Co. v. Campbell, 116 Ark. 119, 172 S. W. 823; State v. Mo. Pac. Ry. Co., 71 Kan. 613, 81 Pac. 212. The Supreme Court of Colorado apparently does not regard the Oregon-Washington case as controlling where State quarantine acts for *cattle* are involved. People v. Morgan, 79 Col. 504, 246 Pac. 1024, 1026.

But we are not called upon to determine the validity of such State quarantine laws. Quarantine legislation relates normally to infestations in the nature of epidemics in specific areas and differs radically in governmental scope and practical operation from day to day inspection of cattle transported in interstate commerce under ordinary conditions. It is noticeable that in Asbell v. Kansas, supra, the federal quarantine act of 1905 was treated as totally irrelevant to the question of the power of the State of Kansas to enforce its inspection laws, which were held not to conflict with the inspection provisions of the Act of 1903.

State inspection laws to prevent importation of diseased cattle have a long background of administrative and legislative approval and the intent "to override existing State authority to deal with local exigencies is not to be imputed to the Congress unless its enactment compels that conclusion * * *." Atchison Ry. v. Railroad Comm., 283 U. S. 380; Savage v. Jones, 225 U. S. 501; Missouri etc. Ry. v. Haber, 169 U. S. 613. The Act of 1903 manifests no such intent. It is not an act of general operation. The Secretary of Agriculture is only empowered by the Act of 1903 to apply regulations to areas where he has "reason to believe" contagious disease exists. It is only when cattle are about to be transported out of such areas that inspec- [fol. 86] tors of the Bureau of Animal Industry are authorized to issue certificates. United States v. Johnson, 35 Fed.

(2d) 256. Moreover, the language of Section One affirmatively implies that the continued operation of State inspection laws is contemplated, for it provides that cattle certified as free from disease by federal inspectors may be transported in interstate commerce "without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry for the purposes of such inspection." Since such animals continue to be subject to federal inspection, the "further inspection" to which they are not thereafter subject must, it would seem, be State inspection. Why should State inspection laws be nullified where federal certificates have been issued unless their continued vigor in the absence of such certificates is contemplated? Why should cattle which are shipped out of areas where the Secretary of Agriculture has "reason to believe" disease exists be expressly subjected to federal supervision unless it was intended that cattle transported under other circumstances from other areas should continue to be subject to State inspection laws? This aspect of the Act of 1903 has not passed unnoticed heretofore. See United States v. Hoover, 133 Fed. 950, 952; Robinson & Reynolds v. Atlantic Coast Line R. Co., 28 Ga. App. 484, 112 S. E. 389, 391.

The Secretary of Agriculture has failed and indeed declined to establish a system of interstate inspection. Meanwhile the States have built up departments to do this work and to guard the live stock within their borders against in- [fol. 87] fection from imported diseased cattle. No attempt has been made by the federal government to check administration by the States, which has now become general. On the contrary, such inspection has been welcomed by the Department of Agriculture and relied on as a safeguard to interstate commerce. In such circumstances it is against all reason to suppose that the States lack the power to protect themselves against manifest and serious dangers in the only available way. The decision in Asbell v. Kansas is a clear sanction of State inspection laws.

We conclude from the scope and language of the statute that, fairly interpreted, it is not in conflict with the order promulgated by the defendant, and that, therefore, the intent to supersede the State's exercise of its police power

is not to be implied. Carey v. South Dakota, 250 U. S. 118. Congress has circumscribed its regulation and occupied a limited field. Atchison T. & S. F. Ry. Co. v. Railroad Comm. of California, 283 U. S. 380, 391-2.

The contention that the defendant's order directly burdens interstate commerce is without merit. The validity of reasonable State inspection laws has always been recognized. Reid v. Colorado, 187 U. S. 137; Asbell v. Kansas, 209 U. S. 251. The order involves no categorical prohibition of all importation of cattle such as was involved in Railroad Company v. Husen, 95 U. S. 465. Plaintiffs have not shown that the defendant's order in any way discriminates against cattle men outside New York. Cattle are only excluded which are diseased or have been exposed to [fol. 88] disease and cattle may lawfully be excluded that have been so exposed. Smith v. St. Louis and Southwestern Ry. Co., 181 U. S. 248. Cattle within New York are subject to regulation and quarantine. Section 76 of the New York Agriculture and Markets Law. People v. Teuscher, 248 N. Y. 454. The New York regulation applies to citizens of New York importing cattle as well as to those of other States. Reid v. Colorado, 187 U. S. at p. 152. There is not the slightest indication in the Supreme Court decisions that a State must have the same regulations for inspection of diseased cattle within its borders as it requires for those entering it. Rasmussen v. Idaho, 181 U. S. 198; Smith v. St. Louis and Southwestern Ry. Co., 181 U. S. 248; Reid v. Colorado, 187 U. S. 151.

It may be argued that the commissioner's order is invalid because it would subject to inspection cattle that have been certified as free from disease by inspectors of the United States Bureau of Animal Industry. The order does not expressly refer to cattle thus certified but it is drawn in general terms and contains no exception in their favor. If applied to such cattle it would doubtless be unconstitutional. Robinson & Reynolds v. Atlantic Coast Line R. Co., 28 Ga. App. 484. But it should not be construed as applying to them, for it must be read in subordination to Section 74 (3) (4) of the New York Agriculture and Markets Law which provides for admission of any cattle accompanied by certificates issued by the United States Bureau of Animal Indus-

try. Even if the order be construed as excluding cattle [fol. 89] with certificates from this Bureau it would not be wholly void. It is well settled that a statute may be constitutional as applied to one set of facts and unconstitutional as applied to another. Dahnke-Walker Co. v. Bondurant, 257 U. S. 289; Kansas City Ry. v. Anderson, 233 U. S. 325. And this is so, not only when the unconstitutional operation of the statute is the result of a distinct and grammatically separable provision, but also when it is the result of general prohibitory language contained in a single clause, provided the intent of the legislature will not be violated by allowing the statute to operate in a limited field. W. J. Sloane v. Commonwealth, 253 Mass. 429; Joel v. Bennett, 276 Ill. 537; State v. Sheldon, 29 Wyo. 233. As Justice Brewer remarked in McCullough v. Virginia, 172 U. S. at p. 112: "However broad and general its (the statute's) language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach."

Whether a state statute which is unconstitutional as applied to one situation is capable of a construction that will give it a restricted and constitutional operation as to other situations is a matter upon which the State courts may speak authoritatively. Smiley v. Kansas, 196 U. S. 447. The New York courts would evidently give effect to the commissioner's order if limited in its scope to cattle upon which it may constitutionally operate. Robert Dollar Co. v. Canadian Car & Fdy. Co., 220 N. Y. at p. 278. To enforce the order within constitutional limits will in no way violate the intent with which it was promulgated. Though it could not constitutionally operate upon cattle certified by federal inspectors, the plaintiff has presented no certificates from [fol. 90] them and, therefore, has not brought himself within the class of persons on whom it could not constitutionally operate. He cannot be heard to complain that the order is unconstitutional as applied to others. Smiley v. Kansas, 196 U. S. 447, at p. 457; Robert Dollar Co. v. Canadian Car & Fdy. Co., 220 N. Y. 270.

The motion for a preliminary injunction should be denied and the bill of complaint dismissed for the reason that the order of the Commissioner of Agriculture and Markets appears to have been validly issued pursuant to Sections 72

and 74 of the Agriculture and Markets Law of the State of New York under a valid exercise of the police power of that State. The temporary restraining order granted to the plaintiff should likewise be vacated.

Augustus N. Hand, U. S. C. J. Frederick H. Bryant, U. S. D. J.

February —, 1933.

[fol. 90½] [File endorsement omitted.]

[fol. 91] Clerk's certificate to annexed paper omitted in printing.

[fol. 92] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

AARON MINTZ and LOUIS MINTZ, Copartners, Doing Business under the Firm Name and Style of Mintz & Mintz, Plaintiffs,

vs.

CHARLES H. BALDWIN, Individually and as Commissioner of Agriculture and Markets of the State of New York, Defendant

Robert E. Whalen, Albany, N. Y., for plaintiff. R. M. Orchard, Assistant Attorney General of Wisconsin, of Counsel.

Henry S. Manley, Counsel, Department of Farms and Markets, State of New York, for Defendant. John J. Bennett, Attorney General, of Counsel. W. O. Brown, Deputy Attorney General, of Counsel.

Before Augustus N. Hand, Circuit Judge, and Frank Cooper and Frederick H. Bryant, District Judges

DISSENTING OPINION—Filed Feb. 15, 1933

The plaintiffs are copartners, doing business under the name of Mintz and Mintz in the States of Wisconsin, New Jersey, and other States, and are engaged in the breeding and sale and transportation in interstate commerce of cattle for dairy and breeding purposes. Their cattle are

purchased or bred and are located in the State of Wisconsin, whence they ship annually to buyers in the State of New York upwards of one thousand head. The defendant, Charles H. Baldwin, is Commissioner of Agriculture and Markets of the State of New York and as such is chief executive officer of the New York Department of Agriculture and Markets.

By Section 24 of the Agriculture and Markets Law the defendant is charged with the duty of providing for the exercise of the powers and the performance of the duties of the Department of Agriculture and Markets and is authorized to make rules in respect to the same. On the 29th of August, 1932, the defendant, in pursuance of Sections 72 and 74 of the Agriculture and Markets Law of the State [fol. 93] of New York promulgated an order to take effect October 1, 1932, providing that all bovine animals coming into the State of New York should comply with the following requirements:

"All cattle over six months of age imported for dairy or breeding purposes shall come directly from herds certified to be free from Bang's disease by the chief live stock sanitary official *official* by whatever name known, of the Country, province or state of origin. Such animals at the time of import must be accompanied by a certificate authenticated by such livestock sanitary official showing the name and address of the laboratory or person making the last blood test on such herd with a complete statement of the results of such test on the animals so imported. Such certificate shall describe each animal in such manner as to enable its identification by ear tag number, name and registration number in the case of pure breds and ear tag number in the case of grades. Such certificate shall include or be accompanied by the certificate above mentioned as to freedom of the herd from Bang's disease. A duplicate of such authenticated certificate or certificates must be filed with the Department of Agriculture and Markets, Albany, N. Y., by the consignee at the time the shipment is received, unless such duplicate has previously been filed by the consignor.

This order shall not apply to the following classes of bovine animals:

(a) Cattle for immediate slaughter, consigned to the public stock yards.

(b) Steers and beef type cattle for feeding and grazing purposes."

On or about the 21st day of October 1932, the plaintiff shipped from the State of Wisconsin to one Edgar Bartlett, at Sharon Station in the State of New York, twenty head of grade cattle for dairy or breeding purposes, all over six months of age, which at the time of their arrival at Sharon Station were accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin, showing the name or address of the laboratory or person making the last blood test on said twenty head of [fol. 94] cattle, with a complete statement that the results of such test showed each of said animals to be free from Bang's disease. The certificate described each of the cattle in such manner as to enable its identification by ear tag and a duplicate of the certificate was filed by plaintiffs with the Department of Agriculture and Markets in Albany, New York, on October 23rd, 1932. It did not certify that the herd from which these cattle came was free from Bang's disease, and because of this fact the plaintiffs were forbidden by the New York Commissioner of Agriculture and Markets to deliver any of them to the purchaser, Edgar Bartlett. The Commissioner ordered the railroad that transported them and still held them in custody to keep them separate from all other animals until inspection had been had and until the further order of the Commissioner, and forbade it to remove any of them from the place where they were except for immediate slaughter and forbade the sale or use of the milk from the animals until it had been heated to a specified temperature. By reason of the issuance of this last order, the plaintiffs felt obliged to reship the cattle and transported them to a point outside of the State of New York.

The bill of complaint alleged in addition to the foregoing that under the Act of Congress of February 2, 1903 (21 U. S. Code, Sec. 120-121-122) and the Act of Congress of March 3, 1905 (21 U. S. Code, Sec. 123-124-125-126), Congress had assumed control of the entire field of transportation and quarantine of live stock which is the subject of commerce between the States in so far as action to prevent [fol. 95] or lessen the spread of dangerous, contagious, infectious or communicable diseases is concerned, and that

such control by Congress excluded from the field any action by the several States in respect thereto and rendered the order of the Commissioner of Agriculture and Markets void as in contravention of the provisions of the Interstate Commerce clause of the Constitution of the United States. The bill of complaint also alleged that the Commissioner's regulations were an undue burden upon Interstate Commerce and thus in violation of the Constitution.

The complaint asks for both a preliminary and a final injunction restraining the defendant and his agents from enforcing the order and from subjecting to inspection, examination and quarantine after interstate transportation shall have been completed animals transported without a certificate that they have come from a herd free from Bang's disease.

An affidavit and the bill of complaint were submitted in support of the motion for a preliminary injunction and likewise answering affidavits were submitted on behalf of the defendants. These affidavits were by stipulation introduced at the final hearing as proofs on behalf of the respective parties.

The answering affidavits are confined chiefly to extracts from papers read at conventions of the United States Live Stock Sanitary Association and the opinions of veterinarians and others, as to the prevalence of Bang's disease among cattle and the restrictive measures taken and advocated by States, owners and others.

[fol. 96] From them it appears that Bang's disease is widely prevalent, is a menace to cattle and sometimes affects the milk from such cattle.

In this memorandum, the Commissioner of Agriculture and Markets of the State of New York will hereinafter be called the State Commissioner and the order promulgated by such State Commissioner in August 1932 will hereinafter be called the October order.

Cooper, J. (dissenting):

It will be seen that the October order prohibits absolutely the importation into the State of New York of cattle for dairying or breeding purposes unless each animal is accompanied by a certificate that such animal comes directly from a herd, all of whose members are free from

Bang's disease and that such certificate shall be made by the chief live stock sanitary official, by whatever name known, of the country, province, or state of origin of the cattle. Certain requirements for such certificates are also contained in the October order.

"Country" or "province" evidently relate to places outside of the United States, and "state" evidently refers to any state of the United States.

No matter what laws concerning interstate or foreign commerce in cattle liable to be afflicted with communicable diseases may have been enacted by the United States, such cattle may not be brought into the State of New York, except in compliance with the October order, if the order is valid. [fol. 97] This October order is, therefore, an interference with and a regulation of interstate and foreign commerce in cattle liable to be afflicted with contagious disease, unless it can be justified as a valid exercise of the police power of the state, only incidentally affecting such commerce.

If the United States has not exercised its power to regulate interstate commerce in such cattle, the right of the state under its reserved police power to establish a restriction on the importation into the state of such suspected cattle would not be destroyed.

Reid vs. Colorado, 187 U. S. 137.
Oregon-Washington Company vs. Washington, 270, U. S. 87 at 101.

But the United States has acted in this respect.
In Asbell vs. Kansas, 209 U. S. 251, 257, it is said:

"Large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretary of Agriculture by the Act of February 2, 1903 (21 U. S. Code, Sec-. 120, 121 and 122), and the Act of March 3, 1905 (21 U. S. C. A., Sec-. 123, 125 and 126)."

The provisions of the Acts need not be fully stated:

"The only part which seems relevant to the case and the question under consideration which arises in it is contained in the law of 1903. In that law it is enacted that when an Inspector of the Bureau of Animal Industry has issued a certificate that he has inspected infectious, contagious or

communicable disease" such animals so inspected and certified may be shipped, driven or transported * * * into * * * any state or territory * * * without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.

There can be no doubt that this is the supreme law and if the State law conflicts with it, the State law must yield."

[fol. 98] Asbell vs. Kansas thus holds that the United States has exercised its power to regulate the interstate movement of cattle which are liable to be afflicted with dangerous, infectious, contagious and communicable diseases and has assumed control of the whole field so far as legislation is concerned.

Other decisions to the same affect, construing the same or a like statute are:

Must Hatch Incubator Company vs. Patterson, 27 Fed. (2nd) 447.

Oregon-Washington R. & N. Company vs. Washington, 270 U. S. 87.

These two cases are more fully referred to later herein.

The defendant contends, however, that the Federal Secretary of Agriculture has not acted under the Act of February 2, 1903, or the Act of March 3, 1905, does not intend to act, and that such failure to act leaves the field unoccupied in the same manner as if these acts had never been enacted.

In his letter to the defendant under date of November 15th, 1932, the Secretary of Agriculture says, not only that he has not acted under these acts, but also that he does not intend to act, saying that "the department is disposed for the present, to leave the control of Bang'- disease to the various states."

He says that "there is now before the Congress a joint resolution, H. J. 12, which would allow the States to act with regard to any animal quarantine measure until such time as the Federal Government may issue regulations on the same subject matter. This department is in sympathy with the provisions of that resolution."

[fol. 99] The statements concerning Bang's diseases, its prevalence and effect upon cattle and upon the milk con-

sumed by human beings, with which the answering affidavits are replete, be true, it is the duty of the Secretary to act, for he must "have reason to believe that such diseases may exist" in Wisconsin, which seems to be a cattle raising state.

He is by the Acts of February 2, 1903, and March 3, 1905, not only authorized but "directed" to act in such circumstances and to make regulations concerning the exportation and transportation of cattle from any place within the United States through any state or territory.

The exercise of the constitutional power to regulate commerce must be by the Congress and the Congress alone. No executive officer, empowered and directed to carry out the provisions of such legislation, may thwart the will of Congress by failing to carry out its mandates.

Public officers are presumed to do their duty and may not render legislation ineffective and inoperative by neglecting to execute the directions of Congress, however praiseworthy or righteous their motives may be in so doing, unless specifically authorized not to act by action of the Congress itself. The Congressional Resolution now pending and favored by the Secretary of Agriculture will upon adoption, doubtless be such authorization. Until adopted there is no such authorization.

The case of Oregon-Washington R. & N. Company vs. Washington, 270 U. S. 87, decides, however, that whether the Secretary of Agriculture acts or does not act, the Act of Congress itself is controlling and occupies the field to the exclusion of the State authority.

[fol. 100] In that case the authorities of the State of Washington discovered the existence in adjoining states of an alfalfa boll weevil pest, which fed upon the leaves of the plant to the great damage of the crop and that there was danger that transportation of alfalfa in box cars would carry the pest into the State of Washington. They thereupon made a State quarantine regulation pursuant to state statute, prohibiting the transportation of alfalfa into the State except in sealed containers.

The Oregon-Washington Railway & Navigation Company disregarded this State quarantine regulation and transported alfalfa in box cars from the infected states into the State of Washington. The State brought an action against

the railway company in the State court for an injunction, to restrain such transportation of alfalfa in box cars, which was granted and affirmed by the highest Court of the State. Appeal was taken by the defendant to the United States Supreme Court.

There the Court first considered the question whether or not the Federal Legislation occupied the field to the exclusion of the State police power.

After discussing the Federal Legislation under which the Court held, in Reid vs. Colorado, 187 U. S. 137, that the United States had not occupied the field the Court said (page 101):

"The Act we are considering is very different. It makes no reference whatever to cooperation with State authorities. It proposes the independent exercise of Federal Authority with reference to quarantine in interstate commerce. It covers the whole field so far as the spread of the plant disease by interstate transportation can be affected and restrained. With such authority vested in the Sec- [fol. 101] retary of Agriculture, and with such duty imposed upon him, the State laws of quarantine that effect interstate commerce and this Federal Law cannot stand together. The relief sought to protect the different states, in so far as it depends on the regulation of interstate commerce must be obtained through application to the Secretary of Agriculture.

In the relation of the States to the regulation of interstate commerce by Congress, there are two fields. There is one in which the State cannot interfere at all, even in the silence of Congress. In the other (and this is the one in which the legitimate exercise of the State's police power brings it into contact with interstate commerce so as to affect the commerce) the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action.

But when Congress has acted and occupied the field as it has here, the power of the State to act is prevented or suspended."

The Court then passed upon the identical contention made there, as here, that if the Secretary of Agriculture did not

act, the effect was the same as if Congress has not acted at all, leaving the State free to Act.

That Court said at page 102:

"It is suggested that the State may act in the absence of any action by the Secretary of Agriculture, that it is left to him to allow the states to quarantine and that *if he does not act there is no invalidity in the State Action. Such construction as that cannot be given to the Federal Statute.* The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment is necessary. *When he does not act,* it must be presumed that it is not necessary. *With the Federal Law in force, State action is illegal and unwarranted.*"

While this case construes the plant quarantine act of August 20, 1912 (7 U. S. Code, Chapter 8) as amended in 1917, that Statute is substantially like the Act of February 2, 1903, and March 3, 1905, in its essential provisions directing the Secretary of Agriculture to act and the case decides the precise question here involved.

[fol. 102] The defendant calls this Oregon-Washington case an Exceptional one but it is exceptional only in that it is the first Supreme Court case which has expressly decided that the failure of the Secretary of Agriculture to Act has no bearing on the scope or operation of the statute. In other respects it declares the supremacy of the Federal authority in the exercise of its constitutional power to regulate interstate commerce, in harmony with preceding and succeeding cases.

Some of these cases are:

Asbell vs. Kansas, 209 U. S. 251 Supra.
Northern Pacific Railway Company vs. Washington, 222 U. S. 370.
Southern Pacific Railway Company vs. R. C. Com., 236 U. S. 439.
N. Y. C. & H. R. R. Co. vs. Winfield, 244 U. S. 147.
Napier vs. Atlantic Coast Line, 272 U. S. 605.
Missouri Pacific Railway Company vs. Porter, 273 U. S. 341.

This Oregon-Washington decision was handed down March 1, 1926. On April 13, 1926, Congress amended Sec-

tion 8 of this Statute (7 U. S. C. A. 161) by providing that until the Secretary of Agriculture does Act, the State Police regulations may be enforced as if there were no Federal Act.

The Case of the Must Hatch Incubator Company vs. Patterson, Governor of Oregon, 27 Fed. (2nd) 447, is also precisely in point and upon the statutes here involved and in strict analogy, because there as here, the Secretary of Agriculture had not acted. In that case the injunction was granted by a Statutory Federal Court of three Judges against a state regulation prohibiting the importation into the States of Oregon and Washington of baby chicks un- [fol. 103] less accompanied by a health certificate showing that they have come from parent stock which has been found free from bacillary white diarrhea by application of the agglutination test, within twelve months immediately prior to their importation or other such tests as may be prescribed or approved by the Bureau of Animal Industry of the Department of Agriculture of the United States. It will be noticed how strikingly like the October order here the Washington regulation was, and it also included a reference to tests prescribed by the Federal authorities, which is not the case here.

At least one State Court case is to the same effect. That is State vs. Chicago, Milwaukee & St. Paul R. R., 206 S. W. 419, where the railroad had been convicted of a violation of a state cattle quarantine order and where there had been no action taken by the Secretary of Agriculture. The conviction of the Railroad Company was reversed and the Court said:

"But it is insisted by the State that until the Secretary of Agriculture acts under the authority given him by Congress * * * the superior authority of Congress could not be considered to have been asserted * * * we think that is a mistaken view as to what Congress did and intended. When Congress by the act above referred to "directed" the Secretary of Agriculture * * * to assume control of the subject.

By such Statute Congress affirmatively and exclusively occupied the field."

Defendant's main support for his contention is this same case, Ashbell vs. Kansas, 209 U. S. 251, Supra. He urges

that this case holds that the Kansas State Inspection Law is valid and does not invade the Federal Field of Interstate Commerce. Hence, argues defendant, the October order, which is like the Kansas statute, is valid.

In this the Defendant Errs.

[fol. 104] The Statute before the Court in Asbell vs. Kansas was a penal statute, apparently a single section of the State Law, viz, Section 27, Chapter 495 of the Session Laws of 1905.

This statute made it a misdemeanor, punishable by fine or imprisonment, or both, for any one to bring into Kansas cattle from any point south of the State without having first caused them to be inspected and passed as healthy by the Bureau of Animal Industry of the United States or by the proper officials of the State of Kansas. It may be taken that there were other provisions of state law elsewhere enacted for inspection as to the health of the cattle, but these provisions were not discussed by the Court.

The Court said, as to the question before it for decision:

"The only Federal question insisted upon in argument is whether the statute was a restriction of interstate commerce which was not within the power of a state to impose."

After referring to the Acts of February 2, 1903 as legislation by Congress covering this very subject, in words which have already been quoted herein, the Court decided the question before it in the following language concerning that act:

"But there can be no doubt but that this is the Supreme Law, and if the state law conflicts with it, the State Law must yield. But the law of Kansas now before us recognizes the supremacy of the National law and conforms to it. The State law admits cattle inspected and certified by the Inspector of the Bureau of Animal Industry of the U. S., thus avoiding a conflict with the National Law."

It is clear, therefore, that the Asbell vs. Kansas case passes only upon the penal section of the State inspection statute, which Section accepts the Federal certificate and thus avoids conflict with the Federal Act.

[fol. 105] It decides only that the State may, under its own penal law, punish those who bring cattle into the State uninspected by state or federal authority, so long as the State law does not invade the domain of, or conflict with, the Federal authority over interstate commerce but recognizes it as supreme, and expressly protects from penalty under the State law, any one who brings cattle into the State under the provisions of the labor law.

True, the Court does not strike down the State Act as invalid because invading a field exclusively occupied by Federal Law. It recognizes that a State may have a state inspection law, as decided in Reid vs. Colorado, Supra, therein discussed and later in the Oregon-Washington case, supra, so long as it does not invade the Federal field of interstate commerce, conflict with Federal law or affect interstate commerce other than incidentally.

There is nothing in this decision from which an inference can fairly be drawn that a state statute like the October order, or any state inspection statute, is valid when it conflicts with and overrides the Federal law regulating interstate commerce in cattle liable to be afflicted with contagious disease, nor that the Federal law does not fully occupy the field at all times.

The Asbell-Kansas case directly holds to the contrary.

[fol. 106] The defendant suggests that the Act of 1903 involved in the Asbell vs. Kansas case differs from the Acts of 1905 and 1912 as amended in 1917 and that such difference differentiates the Oregon-Washington and Must Hatch cases from Asbell vs. Kansas.

The fact is that the Act of 1903 is the basis of decision in both the Asbell vs. Kansas and the Must Hatch cases.

The similarity, bordering on identity of expression in all these sessions is manifest.

The words "when he may have reason to believe disease exists" in the 1903 Act; the words "when he shall determine the fact that cattle * * * are afflicted with * * * disease" in the 1905 Act; the words "when he shall determine the fact that dangerous plant disease * * * exists" in the 1912 Act changed by the amendment of 1917 to read "when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease", are substantially synonymous in meaning. The Act

of 1903 provides that the certificate of health of cattle shall contain — and makes such certificate supreme over all other inspection.

The Act of 1905 and of 1917, leave the inspection and certification to Rules and Regulations to be made by the Secretary of Agriculture.

The general scheme of all these statutes is the same. They all alike provide that whenever the conditions warrant or require action, the Secretary of Agriculture shall act, and provide for inspection and certificates of health for shipment out of quarantine areas or areas where he has reason to believe disease may exist.

[fol. 107] It is no part of the plan or scheme of these statutes that the Secretary shall have any discretion to permit the states to act in his stead or to subscribe state or Federal action if and when he thinks state action more advisable, more efficient or less expensive to the Federal Government. The conclusive presumption must always be that he will act if occasion requires and that if he does not act it is not necessary to act. The states may not at any time decide that action is necessary contrary to the presumed decision of the Secretary. Congress and Congress alone can relieve the Secretary from the duty of acting when conditions require action. This was done as to Statute involved in the Oregon-Washington case by the resolution passed one month and thirteen days after that decision. If it adopts the resolution now pending and recommended by the Secretary, it will also relieve him as to the Act of 1905 and possibly also the Act of 1903.

If the October order were nothing more than a valid penal statute and had contained a like provision permitting the importation of cattle inspected and certified by the Inspector of the Bureau of Animal Husbandry of the United States, as the Kansas Statute did, there would be no conflict with the Federal Statute and it might come within the decision of the Kansas case.

But the October order contains no such provision and was intended to contain none. It was intended not to accept any Federal inspection certificate whether the Secretary of Agriculture acted or not, but to advance the requirements for admission of cattle to the state beyond those possible under the Federal Law and to exclude all not coming from

a herd, all of whose members were certified by state authority to be free from Bang's disease.

The case of Whipple vs. U. S., 47 Fed. (2nd) 496, is also cited in support of this contention. Whipple and others were convicted of conspiracy to violate the Federal Criminal code by resisting Federal officers attempting to make a test of cattle. The case did not involve the question here [fol. 108] for the cattle were not in interstate commerce. The conviction was reversed for the reason that, as stated by the Court:

"Investigation by the making of tests solely to determine the existance or non-existance of diseases in cattle which are not shown to have entered, or to be about to enter the stream of commerce, lies exclusively within the domain of the police power of the State."

It is also argued that these acts of February 2, 1903 and March 3, 1905 are not acts of General operation but operate only when the Secretary of Agriculture has "reason to believe" under the Act of February 2, 1903, contagious disease exists in certain areas or "shall determine" that such disease exists in any state under the Act of 1905, that then and then only, is he empowered to apply regulations to such area, and that it is only when cattle are about to be transported out of such areas that the inspectors of the Bureau of Animal Industry are authorized to issue certificates, while at all other times the Federal Act is not operative, the state regulation and inspection remain exclusively in effect and there is no conflict with the Federal Power.

It is said that the contention finds support in

Atchison Railway vs. Railway Com., 283 U. S. 380, 391, 393.

Savage vs. Jones, 225 U. S. 506, 533.

Missouri Railway vs. Haber, 169 U. S. 613, 625.

This argument that the Statutes of 1903 and 1905 are not of General operation and are inapplicable to this case for the reason above stated, seems but another way of saying that the Federal Government has not occupied the field to the exclusion of State authority unless the Secretary of Agriculture acts, and this has already been discussed herein. [fol. 109] These three cases cited by defendant must be read in the light of the statutes and questions before the

Court and will be found not to fairly support the contention that the Acts of 1903 and 1905 are not of general application within their scope.

In the Atchison case, it is said:

"Such an intention to override existing state authority to deal with local exigencies is not to be imputed to Congress unless its enactment compels that conclusion."

The statute there was the Federal Railroad law of 1920 and the question was whether or not it gave to the Interstate Commerce Commission full control over the construction of a Union Railroad Station in Los Angeles.

The Court held that the Federal Statute merely required the approval by the Interstate Commerce Commission for the construction of Union stations, and, so far as approval was concerned, was supreme, but, going no further, it was not in conflict with the power of the State to compel construction of a Union station once the approval of the I. C. C. had been obtained.

There was no question of the general as distinguished from the limited or occasional operation of the Statute there. There was question as to how much of the field of control the railroad law covered. But so far as it went, it was of general and universal operation. The decision merely determined its scope.

The case of Savage vs. Jones, 225 U. S. 501, relates to a statute of Indiana, requiring articles of animal food offered for sale within the State to be certified by the State chemist to comply with the State statute and to be stamped with stamps so stating, issued by the state chemist and paid for by the seller. The state statute applied to animal foods manufactured within the State, as well as those shipped into [fol. 110] the State from other States.

The out of state plaintiff contended that the state statute was in conflict with the Federal Food and Drugs Act of June 30, 1906, but the Court held that the Federal Statute had not included that at which the Indiana statute aims, did not cover the same field, and that there was no conflict.

The Supreme Court said of the State Act at page 524:

"It was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food."

The difference between the Indiana Statute thus defined and the October order, which does relate, and exclusively, to interstate and foreign commerce, is clear.

Missouri, etc. vs. Haberman, 169 U. S. Supra, involved the validity of a judgment recovered by a resident cattle owner against a railway for damages caused by its having brought into the state certain cattle alleged to have been afflicted with Texas Fever, which was communicated to the cattle of plaintiff. The Judgment was based upon the common law and a state statute which made actionable the driving or transporting into the state of cattle which were liable to communicate fevers.

The Federal Statutes there involved were not the Acts of 1903 and 1905, but were the same prior statutes which were held in Reid vs. Colorado Supra, not to occupy the field.

The Supreme Court held that neither the Federal Law nor the regulations of the Secretary of Agriculture issued thereunder exempted the railroad from such civil liability, and therefore, did not occupy the field covered by the State Statute.

[fol. 111] The Court said:

"The Act of Congress left the state free to cover that field by such regulations as it deemed appropriate and which only *incidentally* affected the freedom of interstate commerce."

These three cases relate to other statutes and hold that there was no Federal legislation covering the same field as the State statute (Except the matter of Federal Consent in the Atchison case). They do not hold, nor warrant the inference, that the Federal legislation fully occupying the field was existent, but was generally operative only at times and inoperative at other times, depending upon whether the Federal Officer charged with their execution did or did not act.

The same contention was made by counsel on the Oregon-Washington case, supra, that the Act of Congress there involved (August 20, 1912, as amended March 4, 1917) "was not intended to cover the entire field" and was not of general operation (P. 89). But the Court dismissed that contention in the words "It covers the whole field" (P. 101).

The case of U. S. vs. Johnson, 35 Fed. (2nd) 256 (D. C. Nev.) is also claimed to support this contention.

That was a criminal case where the defendant was charged with driving cattle from his ranch in Nevada to his adjoining ranch across the State Line in California without having them tested and certified under a regulation issued by the Secretary of Agriculture prohibiting the shipment interstate of any cattle unless they were subjected to a physical examination and tuberculin test and certified to be free from contagious, infectious and communicable diseases.

[fol. 112] There was no proof that such disease existed among cattle in Nevada nor that the particular cattle were diseased.

The District Court of Nevada sustained demurrer to the indictment on the ground that the regulations were not limited to cattle which had been quarantined or cattle in localities where the Secretary of Agriculture had reason to believe disease existed, but ran to all cattle, diseased or not diseased, exceeded the power given him by statute and were void, or at least not applicable to defendant.

It will be seen that all that the Court decided was the scope of the regulations under the penal provision of the Federal Statute. The Court did not directly decide the question whether the Federal Statute fully occupied the field of transportation of diseased cattle in interstate commerce, which is the discussion here. None of the cases bearing on this point were discussed in the opinion.

Even if this case seems to warrant such an inference, it is out of harmony with Thornton vs. United States, 271 U. S. 414, in which the defendants were indicted for assaulting and interfering with employes of the Bureau of Animal Husbandry, in carrying out like regulations of the Secretary of Agriculture relating to the inspection of cattle suspected of having contagious disease.

The facts have much similarity and the conviction was sustained in the Thornton case. This case, decided in 1926, was not referred to in the Johnson case, decided in 1929.

It was urged on the argument that the State statute, under which the October order was promulgated by the State Commissioner, recognizes and accepts the Federal certificate by Subdivisions 3 and 4 of Section 74 of the Agriculture and Markets law of the State, which is entitled

"Regulations relating to importation" and that the October order thus avoids conflict and comes within Asbell vs. Kansas.

[fol. 113] Subdivision 1 provides:

"No person shall knowingly bring into this state any domestic animal which has an infectious or communicable disease * * *."

Subdivision 2 provides:

"Any person bringing into this — domestic animals for any purpose other than immediate slaughter without taking *precautions* to ascertain whether such animals have an infectious or communicable disease, shall be presumed to have brought them in knowingly and in violation of this section, if they are found to have such disease."

Subdivision 3 recognizes Federal Supervision and reads as follows:

"Animals received from outside the State under the Supervision of the United States Department of Agriculture or the Department of Agriculture and Markets of the State of New York or for which a permit shall have been issued by either of such departments, shall be deemed to have been handled with due precaution."

Subdivision 4 also recognizes Federal Inspection and certificate:

"Any person importing or bringing into this State neat cattle for dairy or breeding purposes shall report immediately upon bringing such cattle into the State, to the Department in writing, stating the number of cattle thus brought in, the places where they were procured, the lines over which they were brought, their destination within the state and when they will arrive thereat; and if there be filed with the department at the time of filing such report or within ten days thereafter, a certificate by a duly authorized veterinary practitioner approved by the authorities of the state in which he resides or by an authorized veterinary inspector of the United States Bureau of Animal Industry to the effect that he has duly examined such animals and that they are free from any infectious or communicable disease, the

commissioner may issue a permit to such person to remove such cattle immediately. Otherwise such person shall detain such animals at the point of destination for at least twenty days for inspection or examination by the commissioner or his duly authorized agent. The provisions of this subdivision relating to advance reports to this department shall not apply to cattle imported into this state at a point where there is Federal inspection."

[fol. 114] The State Statute accepts the Federal Inspection and certificate of the health of the individual animal and receives such animal as lawfully imported.

But the October order excludes and ignores Federal Inspection and certificate entirely, whether the Secretary of Agriculture has acted or not acted, and excludes all animals which are not certified by the Chief live stock sanitary official of the State of origin, to be disease free and to have come from a disease free herd. Clearly this conflicts with Section 74 of the New York State Agriculture and Markets Law.

The question whether or not an order of a state officer transcends his statutory authority is ordinarily a state and not a Federal question so long as the order does not invade the exclusive field of Federal authority.

But when the October order seeks to regulate interstate shipments into the State, of cattle liable to be affected with communicable disease and not only transcends the State Statute but conflicts with it, the question whether the order can be said to be a valid exercise of the reserved state police power becomes a Federal question.

It is argued that this October order, though admittedly invalid as to cattle certified to be free from disease by inspectors of the Bureau of Animal Industry and admissable under the Federal statutes referred to, should be held otherwise valid and, in particular, valid as against the plaintiffs, because he holds no such Federal certificate.

This contention is based upon the doctrine of a statutory construction that a statute must be read in the light of the Constitution, which binds the legislative body, that, however broad and general its language, the statute cannot be [fol. 115] interpreted as extending beyond those matters which it is within the constitutional power of the Legislature to reach, and that when the constitutional part may be

separated from the unconstitutional part, the former is valid and may be enforced.

McCullough vs. Virginia, 172 U. S. 102.

This doctrine is based upon the assumption that the legislature acted in good faith and without knowledge that it was including unconstitutional as well as constitutional objects within its enactment or intention to do so.

An Executive officer issuing regulations pursuant to statute has his path plainly laid out for him by the Statute which gives him authority, and if he transgresses and conflicts with its plain terms, he is entitled to no assumption that he did so inadvertently. His regulation may at any time be withdrawn, modified, and reissued without delay, difficulty, or the operation of any cumbersome legislature machinery.

Here there can be no assumption that the State commissioner acted inadvertently for it is clear that the October order was the result of an understanding between the Secretary of Agriculture and the State Commissioner to the effect that the Secretary of Agriculture would permit no Federal Certificates to be issued, but would leave the entire matter to the States, and that the October order would exclude cattle which would be admissible under State Statute, if the Secretary of Agriculture had acted as directed by the Federal Statute to do.

Nor is this October order a divisible one, enforceable as to its alleged valid and constitutional parts and invalid as to the remainder. It is one and indivisible. It is claimed [fol. 116] to be valid and applicable to cattle when the Federal Bureau of Animal Husbandry is not ready to issue health certificates for such cattle and invalid when the bureau is ready to issue such certificates though the cattle be the same and be free from disease at both times.

Such a statute or regulation, uncertain and variable in its application, broader than warranted by the authority under which it was enacted, and penal in its nature is invalid.

The October Order comes under all these objections. It is made penal in its nature by Sections 40 and 41 of the Agriculture and Markets Law of the State.

U. S. vs. Reese, 92 U. S. 214, 221.

Trade Mark Cases, 100 U. S. 82, 98.

U. S. vs. Harris, 106 N. Y. 624, 641.
Illinois Central Railway vs. McKendree, 203 U. S. 514, 530.

See also
Employers' Liability cases, 207 U. S. 463.
U. S. vs. Johnson, 35 Fed. (2nd) 256.

The defendant asserts, however, that even if it is invalid as to others, it is valid as to plaintiffs for they hold no federal certificate for their cattle and may not be heard to question its invalidity as to others.

But if it were not for the cooperation between the defendant and the Secretary of Agriculture, the Secretary of Agriculture refusing to act when he should act, the plaintiffs would hold such certificates.

[fol. 117] The plaintiffs may not be denied, because, deprived of their rights they have no health certificate. And the defendant should be held estopped from invoking against the plaintiffs the plight in which they unavoidably find themselves when that plight is the consequence of the act of the defendant in cooperation with the Secretary of Agriculture intended to bring about that very plight.

It follows then, that the October Order cannot be said to be valid exercise of the state police power since it excludes from the cattle which have been inspected and certified by an Inspector of the Bureau of Animal Husbandry, while the State Legislature, which alone can exercise the state's police power, has in its enactment of Section 74 expressly directed that cattle so inspected and certified may be received into the State.

Plaintiff contends that the October order is a burden on interstate commerce and invalid for that reason also. Defendant asserts that it is not discriminatory and applies to all states alike outside of New York.

But it does discriminate in favor of New York cattle dealers and against all others. True, there is inspection provided by State Law for New York State Cattle but there is no requirement in such inspection that to be sold in the State they shall come from a herd, all of whose members are free from Bang's disease. The October order requires this of imported cattle but not of domestic cattle.

While Railroad Company vs. Husen, 95 U. S. 465, one of the cases on which plaintiff relies, involves a categorical

prohibition of all importations during nine months of the year and is not analogous, there are other authorities which do support plaintiff's position.

[fol. 118] State Statutes which provide for inspection of imported products not required of local products have been held invalid because discriminatory and burdensome upon interstate commerce.

Minnesota vs. Barver, 136 U. S. 313.
Brimmer vs. Rebeman, 138 U. S. 78.
Voigt vs. Wright, 141 U. S. 62.

So it has been held that State statutes imposing a tax on imported products which *is* not also imposed on state products are invalid.

Weldon vs. Missouri, 91 U. S. 275.
Darnell & Son Company vs. Memphis, 208 U. S. 113.

The principle is the same whether the discrimination relate to tax inspection or any other thing which affects things within the State differently from those coming therein through interstate commerce.

Schallenberger vs. Pennsylvania, 171 I. S. 1.
International Textbook Company vs. Pigg, 217 U. S. 91, 112.
Sioux Remedy Company vs. Cope, 235 U. S. 197.
Dahnke-Walker M. Company vs. Durant, 257 U. S. 282.
Helson & Randolph vs. Kentucky, 279 U. S. 245.

Though there is no proof on the subject, the October order may impose such a burden upon interstate commerce in cattle that the resulting instability, hazard and lessening of opportunity for profit, will substantially destroy the business of shipping cattle into New York State.

If a single animal in a herd of 50 or 100 were affected, no member of the herd could be given the certificate required by the October order.

If that one were withdrawn from the herd, some sub- [fol. 119] stantial amount of time must elapse before the remaining animals could be again examined for the required herd free certificate and added expense would be involved. If, in the meantime, another member of the large herd should be afflicted, another long delay and expense

would be entailed. Such uncertainty, delay and expense is likely to banish all profit and make competition with New York cattle raisers, free from such handicap, practically impossible.

The October order, then, is an invasion of the field of Interstate commerce already fully covered by the Federal law, prescribes requirements greater than the Secretary of Agriculture could make, were he to act under the Federal law, and is invalid; it is not an exercise of the State police power by the State Legislature in whom alone that power resides, but is an illegal and unauthorized attempt to exercise that power by an executive officer in conflict with and in violation of the very statute under which alone he has power to make regulations; it is a discrimination against citizens of all other states in favor of Citizens of New York and is a burden upon interstate commerce.

The result sought to be attained by the October order is highly commendable and appeals to all the members of the Court.

But the Courts cannot be influenced by such consideration to uphold invalid exercise of authority. The Courts must declare the law as they find it, leaving the remedy for newly discovered emergencies in interstate commerce in cattle, real or fancied, to the law making power of the Federal Government.

The Injunction sought should be granted.

Feb. 13, 1933.

[fol. 119½] [File endorsement omitted.]

[fol. 120] Clerk's certificate to annexed paper omitted in printing.

[fol. 121] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF EVIDENCE AND FACTS—Filed March 1, 1933

For the purpose of completing the record in the above entitled cause respecting the proceedings had therein in the District Court of the United States for the Northern District of New York, the following statement of evidence and facts is hereby made, pursuant to the provisions of Equity Rule 75(b):

This cause came on to be heard upon due notice at the United States Post Office building, in the City of Albany, on the 19th day of November, 1932, at twelve o'clock, noon, before Hon. Augustus N. Hand, United States Circuit Judge, Hon. Frank Cooper, United States District Judge, and Hon. Frederick H. Bryant, United States District Judge, sitting as prescribed by § 380 of Title 28 of the United States Code.

Plaintiffs amended paragraph 13 of their bill of complaint so as to read as follows:

Said order, as plaintiffs are informed and believe, constitutes an undue burden upon interstate commerce, in contravention of the provisions of the commerce clause of the Constitution of the United States.

[fol. 122] Defendant filed and served his answer to the bill of complaint as thus amended.

The parties stipulated that the affidavit of Louis Mintz, verified November 4th, 1932, and annexed to the bill of complaint, be received as proof on behalf of plaintiffs, and that the affidavits of defendant Charles H. Baldwin, Charles Linch and John T. Wills, each verified November 18, 1932, and the affidavit of Raymond R. Birch, verified November 19, 1932, be received as proof on behalf of the defendant; whereupon the same was so offered and received in evidence.

Plaintiffs moved upon the pleadings and proofs for a final decree granting to them the relief prayed in their bill of complaint.

Defendant moved upon the pleadings and proofs for a final decree dismissing the bill of complaint upon the merits.

The Court took the respective motions of the parties under advisement, reserving decision thereon.

The foregoing statement of evidence and facts is true, correct and complete as therein set forth and is hereby approved by the Court as being a full, true, correct and complete statement of the evidence and facts upon which this cause was substituted and tried.

Approved this 21st day of February, 1933.

Augustus N. Hand, United States Circuit Judge. Frank Cooper, United States District Judge. Frederick H. Bryant, United States District Judge.

[fol. 123] Stipulated that the foregoing statement of evidence and facts is true, correct and complete and that the same be so certified and approved by the Court without further notice.

Dated, February 21, 1933.

Whalen, McNamee, Creble & Nichols, Solicitors for Plaintiffs. Henry P. Manley, John J. Bennett, Jr., Solicitors for Defendant.

[fol. 123½] [File endorsement omitted.]

[fol. 124] Clerk's certificate to annexed paper omitted in printing.

[fol. 125] In United States District Court

[Title omitted]

Findings of Fact—Filed March 1, 1933

1. This is a suit of a civil nature in equity, between citizens of different states, which arises under the Constitution and laws of the United States and the matter in controversy exceeds the sum of Three thousand dollars ($3,000.), exclusive of interest and costs.

2. Plaintiffs at all of the times hereinafter mentioned were, and now are, citizens and residents of Appleton, in the State of Wisconsin, and co-partners in trade, doing business under the firm name and style of Mintz & Mintz, in the States of Wisconsin, New Jersey, and other states.

3. Plaintiffs, as such co-partners, at all of the times hereinafter mentioned, have been and now are engaged in the breeding and in the sale and transportation in interstate commerce of cattle for dairy and breeding purposes. Plaintiffs' herds of cattle are purchased or bred and are located in the State of Wisconsin, from which State of Wisconsin plaintiffs ship annually to buyers in the State of New York upwards of a thousand head of cattle. Plaintiffs, at great expense, have built up and developed a valuable trade and good will in the State of New York among buyers of plain-
[fol. 126] tiffs' cattle for dairy and breeding purposes, which

valuable trade and good will exceeds in value the sum of Three thousand dollars ($3,000.).

4. At all of the times hereinafter mentioned, the above-named defendant, Charles H. Baldwin, was, and now is, Commissioner of Agriculture and Markets of the State of New York, having his principal office as such Commissioner in the State Office Building, in the City and County of Albany, in the Northern District of New York.

5. As such Commissioner of Agriculture and Markets the above-named defendant is chief executive officer of the department of Agriculture and Markets, established by §270 of the State Departments Law of the State of New York, being Chapter 78 of the Consolidated Laws of the State of New York.

6. By §24 of the Agriculture and Markets Law of the State of New York, constituting Chapter 69 of the Consolidated Laws of said State, defendant, as such Commissioner, is charged with the duty of providing generally for the exercise of the powers and performance of the duties of said Department of Agriculture and Markets, as prescribed in said Agriculture and Markets Law and the other laws of the State of New York, and providing generally for the enforcement of the provisions of such laws and of the rules enacted as provided in said Agriculture and Markets Law, and to such ends he is authorized to enact, amend and repeal necessary rules which shall provide for the exercise of the powers and performance of the duties of said department.

7. On or about the 29th day of August, 1932, the above named defendant, acting as such Commissioner, promulgated, published and posted an order (designated in the bill of complaint herein as said order), a copy whereof marked "A" is annexed to and made a part of the bill of complaint herein.

[fol. 127] 8. Defendant's authority for so promulgating, publishing and posting said order is contained in sections 72 and 74 of the Agriculture and Markets Law of the State of New York, constituting Chapter 69 of the Consolidated Laws of said State.

9. On or about the 21st day of October, 1932, plaintiffs shipped from Appleton, in the State of Wisconsin, to one

Edgar Bartlett, at Sharon Station, in the State of New York, twenty head of grade cattle for dairy or breeding purposes, all over six months of age, which twenty head of cattle, at the time of their arrival at Sharon Station, aforesaid, were accompanied by a certificate authenticated by the chief live stock sanitary official of the State of Wisconsin, showing the name and address of the laboratory or person making the last blood test on said twenty head of cattle, with a complete statement that the results of such test showed each of said animals to be free from Bang's disease. Said certificate described each of said twenty head of cattle in such manner as to enable its identification by ear tag and a duplicate of such certificate was filed by plaintiffs with the Department of Agriculture and Markets of the State of New York, at the office thereof in the City of Albany, on or about the 23rd day of October, 1932.

10. Because said certificate neither included nor was accompanied by any certificate that the herd from which said twenty head of cattle came was free from Bang's disease, the above-named defendant, upon the arrival of said twenty head of cattle at Sharon Station, aforesaid, and before delivery thereof to said Edgar Bartlett, on the 26th day of October, 1932, issued an order, a copy whereof marked "B" is annexed to and made a part of the complaint herein. By reason of the issuance by defendant of the order last aforesaid, plaintiffs were unable to complete delivery of any of said twenty head of cattle to said Edgar Bartlett, and plaintiffs were compelled to and did, at great pecuniary loss, reship all of said twenty head of cattle from Sharon Station, aforesaid, and transport them to a point outside of the State of New York.

[fol. 128] 11. Should plaintiffs, in disregard of said order, continue to sell and transport their cattle for dairy and breeding purposes from the State of Wisconsin into the State of New York, plaintiffs will be subect to a multiplicity of prosecutions and suits for the collection of the penalties prescribed in sections 40 and 41 of the Agriculture and Markets Law of the State of New York.

12. Defendant's continued enforcement of said order will cause irreparable damage to plaintiffs, to whom the value of conducting their said business, unaffected by said order, exceeds three thousand dollars.

13. Bang's disease is generally prevalent among dairy cattle throughout the United States. It causes infected cows to lose their young during the period of pregnancy and it is one of the greatest limiting factors in dairy herds of the United States, both as to reproduction and milk yield.

14. The disease known as Undulant Fever is caused by the presence of Bang's disease germs in the human body and such infection can come about from drinking raw milk from an infected cow.

15. Bang's disease may generally be diagnosed about sixty days after the infection of the animal, though the time may be considerably longer.

16. The two blood tests which are customarily made to detect Bang's disease may not disclose it if it is still in the incubative stage.

17. A substantial percentage of cattle imported into New York State under certificate that they have passed tests for Bang's disease are shown to have been in fact infected. There is a body of expert opinion that such cattle should only be admitted when certified to have come from a clean [fol. 129] herd and that by such a safeguard, danger of infection would be greatly lessened.

18. Bang's disease is exceedingly infectious and the defendant concluded that in order to protect herd owners and milk consumers he should require a certificate not only that imported cattle showed no infection but that they came from herds free from disease. This conclusion resulted in the order referred to above.

19. By reason of the danger of infection from Bang's disease many States of the Union have imposed restrictions upon the admission of cattle intended to mitigate the danger from Bang's disease.

20. The United States Department of Agriculture has been aware of the legislation and regulation of the States in respect to Bang's disease, and as late as November 15, 1932, declared its own policy in a letter from Secretary Hyde to the defendant, set out in full text in the defendant's affidavit, and in part as follows:

"With regard to the regulation and control of Bang's disease, also known as contagious abortion, you are advised that this Department has issued no quarantines or regulations pertaining to this disease. The Department is aware, however, that over twenty of the States have issued such regulations governing the importation of cattle into their States so as to prevent the introduction of this disease. The Department is disposed, for the present, to leave the control of Bang's disease with the various states."

The foregoing findings of fact hereby are approved this 21st day of February, 1933.

Augustus N. Hand, United States Circuit Judge.
Frank Cooper, United States District Judge.
Frederick H. Bryant, United States District Judge.

[fol. 129½] [File endorsement omitted.]

[fol. 130] Clerk's certificate to annexed paper omitted in printing.

[fol. 131] In United States District Court

[Title omitted]

Conclusions of Law—Filed March 1, 1933

1. The order made Exhibit "A" to the bill of complaint was issued consistently with the provisions of Sections 72 and 74 of the Agriculture and Markets Law of the State of New York.

2. The order is directed to a field of regulation which has not been fully covered by federal legislation, and in which the federal government has not attempted to supersede the police power of the States.

3. The order, so far as appears in this suit, is not in conflict with any federal legislation.

4. The order does not discriminate against owners of cattle outside New York State, and is not a direct burden upon interstate commerce.

5. No reason appears for holding the order to be otherwise than valid and constitutional.

6. The motion for an interlocutory injunction should be denied and the bill of complaint should be dismissed.

[fol. 132] The foregoing conclusions of law hereby are approved this 24 day of February, 1933.

Augustus N. Hand, United States Circuit Judge.
Frederick H. Bryant, United States District Judge.

[fol. 132½] [File endorsement omitted.]

[fol. 133] Clerk's certificate to annexed paper omitted in printing.

[fol. 134] In United States District Court for the Northern District of New York

In Equity. No. 2634

Aaron Mintz and Louis Mintz, Copartners, Doing Business under the Firm Name and Style of Mintz & Mintz, Plaintiffs,

against

Charles H. Baldwin, Individually and as Commissioner of Agriculture and Markets of the State of New York, Defendant.

Decree—Filed March 1, 1933

This cause came on to be heard on November 19, 1932, before a Court consisting of Honorable Augustus N. Hand, United States Circuit Judge, Honorable Frank Cooper, United States District Judge, and Honorable Frederick Bryant, United States District Judge, and was argued by counsel, and thereupon, upon consideration thereof, it was by a majority of the judges sitting ordered, adjudged and decreed as follows, viz:

That the plaintiffs' motion for an interlocutory or preliminary injunction be and the same hereby is denied.

That the bill of complaint be and hereby is dismissed.
Dated the 24 day of February 1933.
Enter.

Augustus N. Hand, United States Circuit Judge.
Frederick H. Bryant, United States District Judge.

[fol. 134½] [File endorsement omitted.]

[fol. 135] Clerk's certificate to annexed papers omitted in printing.

[fol. 136] In United States District Court

[Title omitted]

Petition for Appeal—Filed March 3, 1933

To the District Court of the United States for the Northern District of New York and to the Honorable Judges thereof:

The above named plaintiffs, Aaron Mintz and Louis Mintz, copartners, doing business under the firm name and style of Mintz & Mintz, feeling themselves aggrieved by the final decree of this Court entered March 1, 1933, in the office of the Clerk thereof, respectfully pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein plaintiffs consider said decree to be erroneous are set forth in the Assignment of Errors herewith filed, to which reference is hereby made.

Plaintiffs pray for a reversal of said decree and that a transcript of the record, proceedings and papers on which said decree was made and entered may be transmitted forthwith, in duly authenticated form, to the Supreme Court of the United States.

Dated March 2, 1933.

Whalen, McNamee, Creble & Nichols, Solicitors for Plaintiffs. Office and Post Office Address: 75 State Street, Albany, New York.

[fol. 137] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 3, 1933

The above named plaintiffs, in connection with their petition for appeal, file the following assignment of errors on which they rely on their appeal to the Supreme Court of the United States from the decree of the District Court herein entered March 1, 1933.

The learned District Court erred in deciding, holding and adjudging:

I. That defendant's order, a copy whereof marked "A" is annexed to and made a part of the bill of complaint herein, was issued consistently with the provisions of Sections 72 and 74 of the Agriculture and Markets Law of the State of New York.

II. That said order is directed to a field of regulation which has not been fully covered by federal legislation, and in which the federal government has not attempted to supersede the police power of the States.

III. That said order, so far as appears in this suit, is not in conflict with any federal legislation.

IV. That said order does not discriminate against owners of cattle outside New York State, and is not a direct burden upon interstate commerce.

[fol. 138] V. That no reason appears for holding the said order to be otherwise than valid and constitutional.

VI. That the bill of complaint herein should be dismissed.

VII. And the learned District Court erred in dismissing the bill of complaint herein.

Wherefore plaintiffs pray that the aforesaid decree be reversed, and that the District Court of the United States for the Northern District of New York be directed to enter a decree in accordance with the prayer for relief contained in the bill of complaint herein.

Dated March 2, 1933.

Whalen, McNamee, Creble & Nichols, Solicitors for Plaintiffs. Office and Post Office Address: 75 State Street, Albany, New York.

[fol. 138½] [File endorsement omitted.]

[fol. 139] Clerk's certificate to annexed paper omitted in printing.

[fol. 140] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

In Equity. No. 2634

AARON MINTZ and LOUIS MINTZ, Copartners, Doing Business under the Firm Name and Style of Mintz & Mintz, Plaintiffs,

against

CHARLES H. BALDWIN, Individually and as Commissioner of Agriculture and Markets of the State of New York, Defendant

ORDER ALLOWING APPEAL—Filed March 3, 1933

The plaintiffs in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the decree made in said suit by the District Court of the United States for the Northern District of New York, and entered in the office of the Clerk thereof March 1st, 1933, and having presented and filed their petition for appeal, prayer for reversal, assignment of errors and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided,

Now, on motion of Whalen, McNamee, Creble & Nichols, as solicitors for plaintiffs, it is

Ordered that the appeal be, and the same hereby is, allowed in the above entitled cause, as provided by law, to the Supreme Court of the United States, from the District Court of the United States for the Northern District of New York; and it is further

Ordered that the Clerk of the District Court of the United States for the Northern District of New York prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court

of the United States so that it shall have the same within [fol. 141] forty days from this date; and it is further

Ordered that security for costs on said appeal be, and the same hereby is, fixed at a bond in the sum of Five hundred Dollars ($500), and approved by the undersigned.

Dated March 2, 1933.

Frank Cooper, Judge of the District Court of the United States for the Northern District of New York.

[fols. 141½ & 142] [File endorsement omitted.]

[fols. 143 & 143½] Citation, in usual form, showing service on Henry S. Manley, filed March 3, 1933, omitted in printing.

[fol. 144] Clerk's certificate to annexed paper omitted in printing.

[fol. 145] In United States District Court

[Title omitted]

Stipulation as to Transcript of Record—Filed March 3, 1933

Counsel for the respective parties hereby stipulate, pursuant to subdivision 2 of Rule 10 of the Supreme Court of the United States, that only the following portions of the record shall be included in the certified transcript thereof required to be transmitted to the Supreme Court of the United States:

1. Notice of motion, dated November 10, 1932;
2. Bill of complaint, together with copies of orders, marked "A" and "B", thereto attached;
3. Affidavit of Louis Mintz, verified November 4, 1932;
4. Temporary restraining order;
5. Answer;
6. Affidavit of Charles H. Baldwin, verified November 18, 1932;
7. Affidavit of Charles Linch, verified November 18, 1932;

8. Affidavit of John T. Wills, verified November 18, 1932;
9. Affidavit of Raymond R. Birch, verified November 19, 1932;
10. Statement of evidence and facts;
[fol. 146] 11. Prevailing opinion of Circuit Judge Augustus N. Hand;
12. Dissenting opinion of District Judge Cooper;
13. Findings of fact;
14. Conclusions of law;
15. Decree;
16. Petition for appeal;
17. Assignment of errors and prayer for reversal;
18. Order allowing appeal;
19. Citation with proof of service;
20. Jurisdictional statement under paragraph 1 of Rule 12 of the Supreme Court of the United States;
21. Proof of notice of service on appellee, pursuant to paragraph 2 of Rule 12 of the Supreme Court of the United States;
22. This stipulation.

Dated March 2, 1933.

Robert E. Whalen, Counsel for Appellants. Henry S. Manley, Counsel for Appellee.

[fol. 146½] [File endorsement omitted.]

[fol. 147] Supreme Court of the United States

Statement of Points Upon Which Appellant Relies and Parts of Record to be Printed—Filed March 7, 1933

Come now the appellants and adopt their assignments of error as their statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

James E. Finnegan, Attorney General of Wisconsin; R. M. Orchard, J. E. Messerschmidt, Assistant Attorneys General of Wisconsin, Attorneys for Appellants.

Due service upon the appellee of the annexed statement of the points upon which it intends to rely and designation of

the parts of the record which it thinks necessary for the consideration thereof, is hereby admitted as of this — day of March, 1933, and appellee hereby designates the same parts of the record as appellant for consideration and waives the designation of any additional parts of the record.

Henry S. Manley, Counsel to the Department of Agriculture and Markets of the State of New York; John J. Bennett, Jr., Attorneys for Appellee.

[fol. 148] [File endorsement omitted.]

Endorsed on cover: File No. 37,457. N. New York D. C. U. S. Term No. 760. Aaron Mintz and Louis Mintz, co-partners, doing business under the firm name and style of Mintz & Mintz, appellants, vs. Charles H. Baldwin, individually and as Commissioner of Agriculture and Markets of the State of New York. Filed March 7, 1933. File No. 37,457.